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United States Court of Appeals
FOR THE EIGHTH CIRCUIT.

No. 14,465.
CIVIL

INTERNATIONAL BUILDING COMPANY,
A CORPORATION,
APPELLANT,

VS.

UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI.

Printed Record

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E. E. KOCH

CLERK

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[fol. 2]

Petition.

(Filed in U. S. District Court on October 17, 1949.)

In the District Court of the United States
For the Eastern Division of the Eastern
Judicial District of Missouri.

International Building Company,
a Corporation,

Plaintiff,

vs.

United States of America,
Defendant.

No. 6790

Count I.

1. Plaintiff states that it is a corporation organized and existing under the laws of Missouri, located at St. Louis, Missouri, being incorporated on or about April 14, 1913.

2. That this suit arises under the laws of the United States providing for Internal Revenue, and that this Court has jurisdiction thereof, by virtue of 28 U. S. C. A., Sec. 1346.

3. That there was erroneously and illegally assessed against the plaintiff, for the calendar year 1943, a deficiency in income tax by the defendant's Commissioner of Internal Revenue, in the sum of Two Thousand Six Hundred Thirty-three Dollars and Sixty-eight Cents (\$2,633.68), as more particularly hereinafter stated. That thereafter on July 20, 1948, a statement of income tax due for said year 1943, in the amount of Two Thousand Six Hundred Thirty-three Dollars and Sixty-eight Cents (\$2,633.68) plus interest of Six Hundred Eighty-five Dollars and Nineteen Cents (\$685.19), total of Three Thousand Three Hundred and Eighteen Dollars and Eighty-seven

Cents (\$3,318.87), was sent to plaintiff, which total amount was paid by plaintiff on July 22, 1948, to defendant's Collector of Internal Revenue for the 1st District of Missouri, at St. Louis.

[fol. 3] 4. That claim for refund of said amount was filed with defendant's said Commissioner on December 1, 1948, by filing the same with defendant's Collector aforesaid. That defendant's Commissioner aforesaid has disallowed said claim for refund.

5. That on or about May 1, 1913, plaintiff purchased a 99-year leasehold, together with a 17-story office building thereon, located at 722 Chestnut Street, St. Louis, Missouri, which building was then only partially completed, only the first six floors being occupied, the top 11 floors being unfinished. Said 99-year [least] was dated December 27, 1905, began January 1, 1906, and terminates December 31, 2004. Said lease provides for rental payment of Twenty Thousand Dollars (\$20,000.00) per year, plus payment of all general and special taxes. The consideration given by plaintiff for the aforesaid purchase was Six Hundred Thousand Dollars (\$600,000.00) paid as follows: Three Hundred Thousand Dollars (\$300,000.00) in stock of the plaintiff, being its entire capital stock, represented by Six Thousand (6,000) shares, par value Fifty Dollars (\$50.00) each, together with Three Hundred Thousand Dollars (\$300,000.00) in first mortgage bonds, executed by plaintiff, secured by a first mortgage dated May 1, 1913, upon said leasehold and building.

6. The cost of the construction of said building to November Investment Company, who built it in 1907 to partial completion as aforesaid, was Six Hundred Thousand Dollars (\$600,000.00). Thereafter plaintiff finished and completed the top 11 floors of said building, installed a fifth elevator and a heating plant at a total cost to it of Two Hundred Sixty Thousand Dollars (\$260,000.00).

That this amount of Two Hundred Sixty Thousand Dollars (\$260,000.00) plus its original investment of Six Hundred Thousand Dollars (\$600,000.00) made a total [fol. 4] capital investment in the building of Eight Hun-

dred Sixty Thousand Dollars (\$860,000.00). Subsequently after 1939 and before 1943, permanent investment in said building was made at a cost of Ten Thousand Three Hundred Eighty-three Dollars (\$10,383.00) so that taxpayer's total capital investment is Eight Hundred Seventy Thousand Three Hundred Eighty-three Dollars (\$870,383.00) as shown by taxpayer's income tax return for the calendar year 1943.

7. That for the year 1943, plaintiff took credit for depreciation on its building in the amount of Twelve Thousand Five Hundred Dollars (\$12,500.00), in its income tax return, and One Hundred Eighty-seven Dollars and Fifty Cents (\$187.50) for capital stock tax paid. This figure of Twelve Thousand Five Hundred Dollars (\$12,500.00) figuring less than Two Percent (2%) on its investment in the building. This depreciation deduction and the One Hundred Eighty-seven Dollar and Fifty-Cent (\$187.50) deduction was illegally and erroneously disallowed by defendant's aforesaid Commissioner, who calculated and decided that the building had been over depreciated on December 31, 1942, by Thirty-one Thousand One Hundred Dollars (\$31,100.00), and assessed the deficiency in income tax, set out above.

The said Commissioner calculated the value of the building for depreciation purposes on May 1, 1913, at Four Hundred Thirty Thousand Dollars (\$430,000.00). He then figured the depreciation allowable for certain years that had not been taken by plaintiff, and added to it the depreciation previously taken, and arrived at a total depreciation of Four Hundred and Sixty-one Thousand One Hundred Dollars (\$461,100.00), thereby showing an over depreciation of Thirty-one Thousand One Hundred Dollars (\$31,100.00); he erroneously arrived at this result to the prejudice of plaintiff by the following computation:

[fol. 5]

Reconstruction value May 1, 1913

1,648,800 cu. feet at 36¢.....	\$593,568.00	
Less depreciation 1907 to 1913 @ 2%.....	71,228.00	\$522,340.00
	<u>\$522,340.00</u>	

Economic Value

Average net income between 1914 and 1919, \$20,000.00 per year		
Average net rental over remaining life of building at May 1, 1913, considered to be \$22,000.00 per year		
Total expectancy, \$22,000 x 44 yrs.....	\$968,000.00	
Present value of total expectancy based on Hoskold's Formula at a 6 and 4% rate, gives \$968,000.00 x 0.330,990 equals.....		320,400.00
Total of Reproductive Cost and Economic Value..		842,740.00
Average		421,370.00
Valuation for depreciation May 1, 1913.....		430,000.00
Depreciation allowable		
1-1-1913 to 12-31-1919 (7 yrs. @ 2%).....	60,200.00	
Depreciation allowable 1-1-1920 to 12-31-1932	270,900.00	
Depreciation allowed 1-1-1933 to 12-31-1940 (7 x 15,000.00).....	105,000.00	
Depreciation allowed 1941.....	12,500.00	
" " 1942.....	12,500.00	
		<u>461,100.00</u>
Over-depreciated 12-31-42		\$ 31,100.00

8. Plaintiff states that the aforesaid valuation and method of valuation of its building for depreciation purposes is illegal, erroneous, and has no basis in either law or fact. The adding together of its so-called reconstruction value and its so-called economic value, and taking an average of the two has no basis or sanction in either law or fact. He erroneously failed to include in his figures the Two Hundred Sixty Thousand Dollars (\$260,000.00) which plaintiff had expended in finishing the top 11 floors, in installing a fifth elevator and in installing a heating plant: He erroneously failed to include in his figures the Ten Thousand Three Hundred Eighty-three Dollars (\$10,383.00) additional invested capital: He erroneously used Hoskold's formula in arriving at a so-called economic value when that formula can only be used where a property has a fixed annual return, that being the basis on which the formula was evolved; and plaintiff's building has had a widely fluctuating annual return. Nor is recon-

[fol. 6] struction any evidence of market value. Plaintiff states that the aforesaid basis of computation, deficiency assessed and collection thereof, is illegal and erroneous, being contrary to law and fact.

9. Plaintiff states that under the law as it existed at the time of purchase, the value of its leasehold and building for depreciation purposes is measured by the value of the consideration it paid for it, being Three Hundred Thousand Dollars (\$300,000.00) in stock, fully paid and non-assessable, and Three Hundred Thousand Dollars (\$300,000.00) in first mortgage bonds, plus the value of permanent additions thereafter made to it. As there had been no prior sales of its stock or bonds, showing their value, under the law its value for depreciation purposes is measured by the actual value of the building on May 1, 1913, plus the value of additions thereafter made to it: This value on May 1, 1913, was Six Hundred Thousand Dollars (\$600,000.00), plus the Two Hundred Sixty Thousand Dollar (\$260,000.00) cost of finishing thereafter as aforesaid, and plus the Ten Thousand Three Hundred and Eighty-three Dollars (\$10,383.00) in permanent additions as aforesaid, making a total value for depreciation purposes of Eight Hundred Seventy Thousand Three Hundred Eighty-three Dollars (\$870,383.00) at this time.

Furthermore, as plaintiff was incorporated under the laws of Missouri with a capital stock of Three Hundred Thousand Dollars (\$300,000.00) fully paid, the valuation of its stock cannot be questioned, as the State of Missouri by the issuance of its charter has fixed the value and the defendant is bound thereby.

That there have been previously taken depreciation credit, allowed and allowable, approximately Four Hundred Sixty-One Thousand and One Hundred Dollars (\$461,100.00), and that there still remained for the year 1943, the difference between Eight Hundred Seventy Thousand, Three Hundred Eighty-three Dollars (\$870,383.00) and Four Hundred Sixty-one Thousand One Hundred Dollars [fol. 7] (\$461,100.00), being Four Hundred and Nine Thousand Two Hundred and Eighty-three Dollars (\$409,283.00) still to be taken in the future for depreciation. Plaintiff further states the useful productive life of said building

is 52 years, ending 1959; during which it is entitled under the law to take depreciation credit, and that under the law it is entitled to not less than Two Percent (2%) per year depreciation credit on (Eight Hundred Seventy Thousand Three Hundred Eighty-three Dollars (\$870,383.00) being Seventeen Thousand Four Hundred and Seven Dollars and Sixty-six Cents (\$17,407.66); and that the Twelve Thousand Five Hundred Dollar (\$12,500.00) figure deducted for depreciation by plaintiff is far less than that figure.

10. Plaintiff further states that under the law it is entitled to the deduction of One Hundred Eighty-seven Dollars and Fifty Cents (\$187.50) capital stock tax paid by it, and that thereby the disallowance of same was illegal and erroneous.

11. Plaintiff further states, that beginning with the year 1920, and after the capital investment of Two Hundred Sixty Thousand Dollars (\$260,000.00) had been made in finishing the top 11 floors of said building, and installing a fifth elevator and a heating plant, it began to take depreciation on said building at the rate of two and one-half percent (2½%) of Eight Hundred Sixty Thousand Dollars (\$860,000.00), the amount it then had invested therein. That on or about the year 1925, in conference with agent of defendant's Commissioner of Internal Revenue, it was agreed at that time, that the total invested capital of petitioner was Eight Hundred and Sixty Thousand Dollars (\$860,000.00). That thereafter in its income tax returns, plaintiff took depreciation credit on the basis of said Eight Hundred Sixty Thousand Dollars (\$860,000.00). That said amount of annual depreciation credit continued to be recognized and allowed by defendant's said Commissioner until its 1933 income tax was questioned by said Commissioner [fol. 8]. In the income tax deficiency letter for the year 1933, addressed to plaintiff, the defendant's Commissioner placed the value of said building for depreciation purposes at Three Hundred Eighty-five Thousand Dollars (\$385,000.00) on May 1, 1913, which amount, less depreciation already taken, he amortized over the remaining 72 years of the lease, erroneously disallowed the depreciation taken for 1933, and assessed a deficiency in income tax against plaintiff for that year. Plaintiff took said assess-

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ment by appeal to the then Board of Tax Appeals, now called Tax Court of the United States, the docket number of said appeal, being No. 104020.

That plaintiff continued for the years 1934 and 1939 inclusive to take depreciation credit on the basis of Eight Hundred Sixty Thousand Dollars (\$860,000.00) invested capital. In the income tax deficiency letter for the years 1938 and 1939, addressed to plaintiff, defendant's Commissioner again placed the value of said building for depreciation purposes at Three Hundred Eighty-five Thousand Dollars (\$385,000.00) on May 1, 1913, which amount less depreciation already taken, he amortized over the remaining 72 years' life of the lease, and erroneously again assessed an income tax deficiency against the plaintiff for the years 1938 and 1939. Plaintiff again took an appeal to the then Board of Tax Appeals, the docket number of said appeal being Number 105807.

That in both of said appeals to the Board of Tax Appeals the plaintiff alleged its invested capital to be Eight Hundred Sixty Thousand Dollars (\$860,000.00) as the valuation of its building, depreciation to be taken over the remaining useful life of the building 45 years from May 1, 1913, and that the Commissioner's assessments were thereby illegal and erroneous, exactly as plaintiff alleges in this petition, plus the permanent improvements of Ten Thousand Three Hundred Eighty-three Dollars (\$10,383.00) placed thereon since 1939. That thereafter stipulations between the said Commissioner and plaintiff in both of said appeals were filed with the Tax Court, [fol. 9] that the said deficiency assessments were to be abated. That thereafter the said Tax Court on October 17, 1944, in Case Number 104020 entered its decision and judgment that there was no deficiency in income tax for the year 1933, and also entered the same decision in case Number 105807 for the years 1938 and 1939.

Plaintiff states that thereby the basis for depreciation of Eight Hundred Sixty Thousand Dollars (\$860,000.00) has been adjudged and determined by the Tax Court of the United States, and is res adjudicata thereon.

That thereby the defendant and its said Commissioner is estopped from computing and assessing any income tax

deficiency based on any other amount of valuation for depreciation purposes; that the only issue in both of said appeals to the Tax Court, was the valuation of its building for depreciation purposes and the useful life thereof; that in this suit the same identical issue is involved between the same identical parties; that by reason thereof the assessment and collection of a deficiency income tax for the year 1943 as aforesaid was and is illegal and erroneous.

That the plaintiff is entitled to an allowance for depreciation in the sum of Twelve Thousand Five Hundred Dollars (\$12,500.00) as set out in its return for the year 1943, and that upon allowing said depreciation there should have been no increase in income tax. That the said additional tax paid as assessed should be refunded.

Wherefore, by reason of the aforesaid, plaintiff prays judgment against the defendant in the sum of Three Thousand Three Hundred Eighteen Dollars and Eighty-seven Cents (\$3,318.87), together with interest from July 22, 1948, and for its costs.

[fol. 10]

Count II.

1. Plaintiff states that it is a corporation organized and existing under the laws of Missouri, located at St. Louis, Missouri, being incorporated on or about April 14, 1913.

2. That this suit arises under the laws of the United States providing for Internal Revenue; and that this Court has jurisdiction thereof, by virtue of 28 U. S. C. A. Sec. 1346.

3. That there was erroneously and illegally assessed against the plaintiff for the calendar year 1944, a deficiency in income tax by defendant's Commissioner of Internal Revenue, the sum of Three Thousand Six Hundred Fifty-one Dollars and Ninety-nine Cents (\$3651.99), as more particularly hereinafter stated. That thereafter on July 20, 1948, a statement of income tax due for said year 1944 in the amount of Three Thousand Six Hundred Fifty-one Dollars and Ninety-nine Cents (\$3651.99), plus interest of Seven Hundred Thirty-one Dollars (\$731.00), totaling

Four Thousand Three Hundred Eighty-two Dollars and Ninety-nine Cents (\$4382.99) was sent to plaintiff, which total amount was paid by plaintiff on July 22, 1948, to defendant's Collector of Internal Revenue for the 1st District of Missouri, at St. Louis.

4. That claim for refund of said amount was filed with defendant's said Commissioner on December 1, 1948, by filing the same with defendant's Collector aforesaid. That defendant's Commissioner aforesaid has disallowed said claim for refund.

5. That on or about May 1, 1913, plaintiff purchased a 99-year leasehold, together with a 17-story office building thereon located at 722 Chestnut Street, St. Louis, Missouri, which building was then only partially completed, only the first six floors being then occupied, the top 11 floors being unfinished. Said 99-year lease was dated December 27, 1905, began January 1, 1906, and terminates December 31, 2004. Said lease provides for rental payment of Twenty Thousand Dollars (\$20,000.00) per year, plus payment of all general and special taxes. The consideration given by plaintiff for the aforesaid purchase was Six Hundred Thousand Dollars (\$600,000.00) paid as follows: Three Hundred Thousand Dollars (\$300,000.00) in stock of the plaintiff, being its entire capital stock, represented by Six Thousand (6000) shares, par value Fifty Dollars (\$50.00) each, together with Three Hundred Thousand Dollars (\$300,000.00) in first mortgage bonds, executed by plaintiff, secured by a first mortgage dated May 1, 1913, upon said leasehold in building.

6. The cost of the construction of said building to November Investment Company, who built it in 1907 to partial completion as aforesaid, was Six Hundred Thousand Dollars (\$600,000.00). Thereafter plaintiff finished and completed the top 11 floors of said building, installed a fifth elevator and a heating plant at a total cost to it of Two Hundred Sixty Thousand Dollars (\$260,000.00).

That this amount of Two Hundred Sixty Thousand Dollars (\$260,000.00) plus its original investment of Six Hundred Thousand Dollars (\$600,000.00) made a total

capital investment in the building of Eight Hundred Sixty Thousand Dollars (\$860,000.00). Subsequently after 1939 and before 1943, permanent investments in said building were made at a cost of Ten Thousand Three Hundred Eighty-three Dollars (\$10,383.00) so that taxpayer's total capital investment is Eight Hundred Seventy Thousand, Three Hundred Eighty-three Dollars (\$870,383.00) as shown by taxpayer's income tax return for the calendar year 1944.

7. That for the year 1944, plaintiff took credit on its income tax return for depreciation on its building in the amount of Twelve Thousand Five Hundred Dollars (\$12,500.00), and for professional fees paid Seven Thousand Seventy-two Dollars and Fifty Cents (\$7,072.50), the figure of Twelve Thousand Five Hundred Dollars (\$12,500.00) depreciation figuring less than Two Percent (2%) on its investment in the building. This depreciation deduction [fol. 12] was illegally and erroneously disallowed by defendant's said Commissioner who calculated and decided that the building had been over depreciated on December 31, 1942, by Thirty-one Thousand One Hundred Dollars (\$31,100.00).

The said Commissioner calculated the value of the building for depreciation purposes on May 1, 1913, at Four Hundred Thirty Thousand Dollars (\$430,000.00). He then figured the depreciation allowable for certain years that had not been taken by plaintiff, and added to it the depreciation previously taken by plaintiff, and arrived at a total depreciation of Four Hundred and Sixty-one Thousand One Hundred Dollars (\$461,100.00), thereby showing an over depreciation of Thirty-one Thousand One Hundred Dollars (\$31,100.00); he erroneously arrived at this result to the prejudice of plaintiff by the following computation:

Reconstruction/Value May 1, 1913

1,648,800 cu. feet at 36¢.....	\$593,568.00	
Less depreciation 1907 to 1913 at 2%.....	71,228.00	
	<u>\$522,340.00</u>	\$522,340.00

Economic Value

Average net income between 1914 and 1919, \$20,000.00 per year.....		
Average net rental over remaining life of building at May 1, 1913, considered to be \$22,000.00 per year.....		
Total expectancy, \$22,000 x 44 yrs.....	968,000.00	
Present value of total expectancy based on Hoskold's Formula at a 6 and 4% rate, gives \$968,000.00 x 0.330,990 equals.....		\$ 320,400.00
Total of Reproductive Cost and Economic Value..		842,740.00
Average		421,370.00
Valuation for depreciation May 1, 1913.....		430,000.00
Depreciation allowable		
1-1-1913 to 12-31-1919 (7 yrs. @ 2%).....	60,200.00	
Depreciation allowed 1-1-1920 to		
12-31-1932	270,900.00	
Depreciation allowed 1-1-1933 to		
12-31-1940 (7 x 15,000.00).....	105,000.00	
Depreciation allowed 1941.....	12,500.00	
" " 1942.....	12,500.00	
Over-depreciated 12-31-42		461,100.00
Over-depreciated 12-31-42		\$ 31,100.00

[fol. 13] 8. Plaintiff states that the aforesaid valuation and method of valuation of its building for depreciation purposes is illegal, erroneous and has no basis in either law or fact. The adding together of its so-called reconstruction value and its so-called economic value, and taking an average of the two has no basis or sanction in either law or fact: He erroneously failed to include in his figures the Two Hundred Sixty Thousand Dollars (\$260,000.00) which plaintiff had expended in finishing the top 11 floors, in installing a fifth elevator and in installing a heating plant; He erroneously failed to include in his figures the Ten Thousand Three Hundred Eighty-three Dollars (\$10,383.00) additional invested capital; He erroneously used Hoskold's formula in arriving at a so-called economic value when that formula can only be used where a property has a fixed annual return, that being the basis on which the formula was evolved; and plaintiff's building has a widely fluctuating annual return; nor is reconstruction cost any evidence of market value. Plaintiff states that the aforesaid basis of computation, deficiency assessed and collec-

tion thereof, is illegal and erroneous, being contrary to law and fact.

9. Plaintiff states that under the law as it existed at the time of purchase, the value of its leasehold and building for depreciation purposes is measured by the value of the consideration it paid for it, being Three Hundred Thousand Dollars (\$300,000.00) in stock fully paid and non-assessable, and Three Hundred Thousand Dollars (\$300,000.00) in first mortgage bonds, plus the value of permanent additions thereafter made to it. As there had been no prior sales of its stock or bonds, showing their value, under the law, its value for depreciation purposes is measured by the actual value of the building on May 1, 1913, plus the value of additions thereafter made to it: This value on May 1, 1913, was Six Hundred Thousand [fol. 14] Dollars (\$600,000.00) plus the Two Hundred Sixty Thousand Dollar (\$260,000.00) cost of finishing thereafter as aforesaid, and plus the Ten Thousand Three Hundred and Eighty-three Dollars (\$10,383.00) in permanent additions as aforesaid, making a total value for depreciation purposes of Eight Hundred Seventy Thousand Three Hundred Eighty-three Dollars (\$870,383.00) at this time. Furthermore, as plaintiff was incorporated under the law of Missouri with a capital stock of Three Hundred Thousand Dollars (\$300,000.00) fully paid, the valuation of its stock cannot be questioned, as the State of Missouri by the issuance of its charter has fixed the value and the defendant is bound thereby.

That there has been previously taken depreciation credit, allowed and allowable, approximately Four Hundred Sixty-one Thousand One Hundred Dollars (\$461,100.00), and that there still remained for the year 1944, the difference between Eight Hundred Seventy Thousand Three Hundred Eighty-three Dollars (\$870,383.00) and Four Hundred Sixty-one Thousand One Hundred Dollars (\$461,100.00), being Four Hundred and Nine Thousand Two Hundred and Eighty-three Dollars (\$409,283.00) still to be taken in the future for depreciation.

Plaintiff further states the useful productive life of said building is 52 years, ending in 1959, during which it is entitled under the law to take depreciation credit, and that

under the law it is entitled to not less than Two Percent (2%) per year depreciation credit on Eight Hundred Seventy-Thousand Three Hundred and Eighty-three Dollars (\$870,383.00) being Seventeen Thousand Four Hundred Seven Dollars and Fifty-eight Cents (\$17,407.58); and that the Twelve Thousand Five Hundred Dollar (\$12,500.00) figure deducted for depreciation by plaintiff is far less than that figure.

10. A few days prior to November 12, 1941, at the request of bondholders, the trustee under the deed of trust [fol. 15] securing balance of aforementioned unpaid bonds, which were then past maturity, filed a suit to foreclose said deed of trust which covered plaintiff's building and leasehold. On November 12, 1941, plaintiff filed in United States District Court at St. Louis, its petition for corporate reorganization under Chapter X of the Bankruptcy Act, in order to conserve, preserve and save its property from foreclosure. As a result of such proceedings, through negotiation of a new loan, its bonds were paid and fees for legal services and other services were ordered paid by said Court to be paid as follows:

\$1250.00 to Herman Katcher as attorney for certain bondholders.

\$1250.00 to Barak Mattingly, and \$2500.00 to Malcolm I. Frank, as attorneys for debtor.

\$750.00 to H. A. & R. C. Hamilton as attorneys for indenture trustee.

\$610.00 to Earl Giraldin, indenture trustee.

Totaling \$6360.00.

Plaintiff took credit for the year 1944 for professional fees paid Seven Thousand Seventy-two Dollars and Fifty Cents (\$7072.50) which included the aforesaid fees, as necessary and ordinary deductions in its business. Defendant's Commissioner as aforesaid erroneously and illegally disallowed Six Thousand Three Hundred and Sixty Dollars [(\$63630.00)] as expenses in connection with reorganization applicable to reduction of debts forgiven under said Chapter X of the Bankruptcy Act. Plaintiff states that these fees are properly deductible as ordinary

and necessary expense under Sec. 23 (a) (1) of the Revenue Act, and in addition were required to be paid as a condition to the continued use and possession for the purpose of its business.

11. Plaintiff further states, that beginning with the year 1920, and after the capital investment of Two Hundred Sixty Thousand Dollars (\$260,000.00) had been made in finishing the top 11 floors of said building, installing a [fol. 16] fifth elevator and a heating plant, it began to take depreciation on said building at the rate of two and one-half percent ($2\frac{1}{2}\%$) on Eight Hundred Sixty Thousand Dollars (\$860,000.00), the amount it then had invested therein. That on or about the year 1925, in conference with agent of defendant's Commissioner of Internal Revenue, it was agreed at that time, that the total invested capital of petitioner was Eight Hundred and Sixty Thousand Dollars (\$860,000.00). That thereafter in its income tax returns, plaintiff took depreciation credit for Two and One-Half Percent ($2\frac{1}{2}\%$) of said Eight Hundred Sixty Thousand Dollars (\$860,000.00). That said amount of annual depreciation credit continued to be recognized and allowed by defendant's said Commissioner until its 1933 income tax was questioned by said Commissioner. In the income tax deficiency letter for the year 1933, addressed to the plaintiff, the Commissioner placed the value of said building for depreciation purposes at Three Hundred Eighty-five Thousand Dollars (\$385,000.00) on May 1, 1913, which amount, less depreciation already taken, he amortized over the remaining 72 years of the lease; erroneously disallowed the depreciation taken for 1933, and assessed a deficiency in income tax against plaintiff for that year. Plaintiff took said assessment by appeal to the then Board of Tax Appeals, now called Tax Court of the United States, the docket number of said appeal being No. 104020.

That plaintiff continued for the years 1934 to 1939 inclusive to take depreciation credit on the basis of Eight Hundred Sixty Thousand Dollars (\$860,000.00) invested capital. In the income tax deficiency letter for the years 1938 and 1939, addressed to plaintiff, the defendant's Commissioner again placed the value of said building for de-

preciation purposes at Three Hundred Eighty-five Thousand Dollars (\$385,000.00) on May 1, 1913, which amountless depreciation already taken he amortized over the remaining 72 years' life of the lease, and erroneously again. [fol. 17] assessed an income tax deficiency against the plaintiff for the years 1938 and 1938. Plaintiff again took an appeal to the then Board of Tax Appeals, the docket number of said appeal being No. 105807.

That in both of said appeals to the Board of Tax Appeals the plaintiff alleged its invested capital to be Eight Hundred Sixty Thousand Dollars (\$860,000.00) as the valuation of its building, depreciation to be taken over the remaining useful life of the building 45 years from May 13, 1913, and that the Commissioner's assessments were thereby illegal and erroneous, exactly as plaintiff alleges in this petition, plus the permanent improvements of Ten Thousand Three Hundred Eighty-three Dollars (\$10,383.00) placed thereon since 1939. That thereafter stipulations between the said Commissioner and plaintiff in both of said appeals were filed with the Tax Court, that the said deficiency assessments were to be abated. That thereafter the said Tax Court on October 17, 1944, in Case No. 104020 entered its decision and judgment that there was no deficiency in income tax for the year 1933, and also entered the same decision in case No. 105807 for the years 1938 and 1939.

Plaintiff states that thereby the basis for depreciation of Eight Hundred Sixty Thousand Dollars (\$860,000.00) has been adjudged and determined by the Tax Court of the United States, and is res adjudicata thereon.

That thereby the defendant and its said Commissioner is estopped from computing and assessing any income tax deficiency based on any other amount of valuation for depreciation purposes; that the only issue in both of said appeals to the Tax Court was the valuation of its building for depreciation purposes and the useful life thereof; that in this suit the same identical issue is involved between the same identical parties; that by reason thereof the assessment and collection of a deficiency income tax for the year 1943 as aforesaid was and is illegal and erroneous.

[fol. 18] That plaintiff is entitled to deduction for professional fees paid as aforesaid totaling Six Thousand Three Hundred and Sixty Dollars (\$6360.00) as set out in its return; that plaintiff is entitled to an allowance for depreciation in the sum of Twelve Thousand Five Hundred Dollars (\$12500.00) as set out in its return; and that upon allowing the aforesaid credits, there should have been no increase in income tax. That said additional tax paid as assessed should be refunded.

Wherefore, by reason of the aforesaid, plaintiff prays judgment against the defendant in the sum of Four Thousand Three Hundred Eighty-two Dollars and Ninety-nine Cents (\$4382.99) together with interest from July 22, 1948, and for its costs.

Count III.

1. Plaintiff states that it is a corporation organized and existing under the laws of Missouri, located at St. Louis, Missouri, being incorporated on or about April 14, 1913.

2. That this suit arises under the laws of the United States providing for Internal Revenue, and that this Court has jurisdiction thereof, by virtue of 28 U. S. C. A. Sec. 1346.

3. That there was erroneously and illegally assessed against the plaintiff for the calendar year 1945, a deficiency in income taxes of Four Thousand Six Hundred Thirteen Dollars and Fifty Cents (\$4613.50), and a deficiency in declared value excess profits taxes of Eleven Hundred Fourteen Dollars and Seventy-nine Cents (\$1114.79), all as more particularly hereafter stated. That thereafter on July 20, 1948, a statement of said taxes due for said year 1945 in the amount of Five Thousand Seven Hundred Twenty-eight Dollars and Twenty-nine Cents (\$5728.29) plus interest of Eight Hundred Two Dollars and Ninety Cents (\$802.90), totaling Six Thousand Five Hundred Thirty-one Dollars and Nineteen Cents (\$6531.19), was sent to plaintiff, which total amount was [fol. 19] paid by plaintiff on July 22, 1948, to defendant's Collector of Revenue for the 1st District of Missouri at St. Louis.

4. That claim for refund of said amount was filed with defendant's said Commissioner on December 1, 1948, by filing the same with defendant's Collector aforesaid. That defendant's Commissioner aforesaid has disallowed said claim for refund.

5. That plaintiff alleges herein, paragraphs 5 to 11 inclusive of Counts I and II thereof, as fully as though set forth herein.

6. That for the year 1945, plaintiff took the following deductions in its income tax return:

\$12500.00 depreciation on its building.

\$187.50 capital stock tax paid.

\$7339.02 operating loss carryover from the years 1943 and 1944.

All of these deductions were illegally and erroneously disallowed by defendant's said Commissioner.

7. That plaintiff, under the law, for the year 1945, is entitled to deduction for Twelve Thousand Five Hundred Dollars (\$12500.00) depreciation on its building for the reasons set forth aforesaid.

8. That plaintiff under the law is entitled to deduction for One Hundred Eighty-seven Dollars and Fifty Cents (\$187.50) capital stock tax paid in 1945.

9. That plaintiff as stated aforesaid, took deduction for each of the years 1943 and 1944 in its income tax returns, of Twelve Thousand Five Hundred Dollars (\$12500.00) depreciation on its building. That plaintiff took deduction for the year 1944 in its income tax return, for professional [fol: 20] fees paid Seven Thousand Seventy-two Dollars and Fifty Cents (\$7072.50). That plaintiff suffered an operating loss in 1943 of Two Thousand Five Hundred Sixty-two Dollars and Seventy-eight Cents (\$2562.78) as shown by its income tax return for said year. That plaintiff suffered an operating loss in 1944 of Four Thousand Seven Hundred Seventy-six Dollars and Twenty-four Cents (\$4776.24) as shown by its income tax return for said

year. That the total of these two years' losses is Seven Thousand Three Hundred Thirty-nine Dollars and Two Cents (\$7339.02), which under the law Sec. 122 of the Internal Revenue Code it is entitled to carry over into 1945 as a deduction.

That defendant's Commissioner erroneously and illegally disallowed all of the aforesaid deductions for the year 1943 and the year 1944. That the disallowance of said deductions wiped out the 1945 carryover of aforesaid net losses, which, together with the disallowance of Twelve Thousand Five Hundred Dollars (\$12500.00) depreciation of building for 1945, caused the normal tax net income of plaintiff as computed by defendant, to be Twenty-three Thousand Nine Hundred Sixty-two Dollars and Forty Cents (\$23,962.40) instead of Seven Thousand One Hundred Sixty-eight Dollars and Eighty-seven Cents (\$7168.87) as shown by its 1945 return. And thereafter the said defendant's Commissioner erroneously and illegally computed and assessed the aforesaid deficiency income tax set out aforesaid. That for the reasons set out aforesaid, the aforesaid deductions made by plaintiff for the years 1943 and 1944 were allowable under the law and plaintiff had the lawful right to carry over said losses to the year 1945.

10. That by reason of the aforesaid illegal and erroneous disallowances of deductions as set forth in paragraphs 6, 7, 8, and 9 above, the said defendant's Commissioner computed a net income for 1945 of Twenty-seven Thousand One Hundred Ninety-five Dollars and Thirty-nine Cents [fol. 21] (\$27,195.39) for declared value excess profits tax, and thereby illegally and erroneously assessed against plaintiff the aforesaid deficiency declared value excess profits taxes.

11. That the income tax returns of plaintiff for the years 1943, 1944 and 1945 are true and correct, and that under the law it is entitled to the deductions set forth in each of said tax returns, and is entitled to the loss carryover from 1943 and 1944.

That plaintiff is entitled to an allowance for depreciation in the sum of Twelve Thousand Five Hundred Dollars (\$12500.00) for each of the years 1943, 1944 and 1945 as

set out in its respective returns; that plaintiff is entitled to deduction for professional fees paid as aforesaid totaling Six Thousand Three Hundred Sixty Dollars (\$6360.00) as set out in its return for the year 1944; that the allowance of such credits creates an operating loss for the years 1943 and 1944; and that plaintiff is thereby entitled to carry over such losses to 1945 as shown on its return; and that there should have been no increase in income tax, nor increase in declared value excess profits tax. That said additional taxes paid as assessed should be refunded.

Wherefore, by reason of the aforesaid, plaintiff prays judgment against defendant in the sum of Six Thousand Five Hundred Thirty-one Dollars and Nineteen Cents (\$6531.19), together with interest from July 22, 1948, and for its costs.

Count IV.

1. Plaintiff states that it is a corporation organized and existing under the laws of Missouri, located at St. Louis, Missouri, being incorporated on or about April 14, 1913.

2. That this suit arises under the laws of the United States providing for Internal Revenue, and that this Court has jurisdiction thereof, by virtue of 28 U. S. C. A. Sec. 1346.

[fol. 22] 3. That there was erroneously and illegally assessed against the plaintiff, for the calendar year 1945, a deficiency in excess profits taxes by the defendant's Commissioner of Internal Revenue, the sum of One Thousand Eight Hundred Eleven Dollars and Six Cents (\$1811.06) as more particularly hereinafter stated. That thereafter on July 20, 1948, a statement of excess profits for said year 1945 in the amount of One Thousand Eight Hundred Eleven Dollars and Six Cents (\$1811.06) plus interest of Two Hundred Fifty-three Dollars and Eighty-five Cents (\$253.85), totaling Two Thousand Sixty-four Dollars and Ninety-one Cents (\$2064.91) was sent to plaintiff, which total amount was paid by plaintiff on July 22, 1948, to defendant's Collector of Internal Revenue for the 1st District of Missouri at St. Louis.

4. That claim for refund of said amount was filed with defendant's said Commissioner on December 1, 1948, by filing the same with defendant's Collector aforesaid. That defendant's Commissioner aforesaid has disallowed said claim for refund.

5. That plaintiff alleges herein paragraphs 5 to 11 inclusive of Counts I, II and III, as fully as though set forth herein.

6. That the defendant's Commissioner, for the reasons set out above, erroneously and illegally determined that the equity invested capital at the beginning of year 1945 was One Hundred Thirty Thousand Dollars (\$130,000.00) without any legal or factual basis and he determined that average borrowed invested capital was Seventy-four Thousand Six Hundred Six Dollars and Fifty Cents (\$74,606.50), totaling Two Hundred and Four Thousand, Six Hundred and Six Dollars and Fifty Cents (\$204,606.50) on which eight percent (8%) credit was allowed.

Defendant's Commissioner than erroneously and illegally [fol. 23] computed and assessed the excess profits tax against plaintiff as set forth above. Plaintiff states that eight percent (8%) credit should have been allowed on a total of Three Hundred Seventy-four Thousand Six Hundred and Six Dollars and Fifty Cents (\$374,606.50), representing Three Hundred Thousand Dollars (\$300,000.00) actual invested capital, plus Seventy-four Thousand Six Hundred Six Dollars and Fifty Cents (\$74,606.50) average borrowed invested capital. That plaintiff is entitled to the same credit for each of the years 1943 and 1944, and not having used this credit during said years, is entitled to carry it over to 1945, and thereby there is no excess profits tax due under the law.

That plaintiff is entitled to an allowance for depreciation in the sum of Twelve Thousand Five Hundred Dollars (\$12500.00) for each of the years 1943, 1944 and 1945 as set out in its respective returns; that plaintiff is entitled to deduction for professional fees paid as aforesaid, totaling Six Thousand Three Hundred Sixty Dollars (\$6360.00) as set out in its return for the year 1944; that the allowance of such credits creates an operating loss for the years

1943 and 1944, and that plaintiff is thereby entitled to carry over such losses to 1945 as shown on its return; that plaintiff in computing excess profits tax is entitled to the credit for the years 1943 and 1944 and to carry such unused credit over into 1945 as set forth in paragraph 6 above; and that thereby there should have been no excess profits tax due; that said excess profits tax paid as so assessed should be refunded.

Wherefore, the premises considered, plaintiff prays judgment against defendant in the sum of Two Thousand [fol. 24] Sixty-four Dollars and Ninety-one Cents (\$2064.91), together with interest from July 22, 1948, and for its costs.

MALCOLM I. FRANK,
WILLIAM M. FITCH,
Attorneys for Plaintiff,
722 Chestnut Street,
St. Louis 1, Missouri,
GA. 0246.

[fol. 25] Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter and Over the Person.

(Filed in U. S. District Court on February 16, 1950.)

Defendant moves the Court to dismiss the action on the ground that the Court lacks jurisdiction because:—

1. The action is against the United States, which has not waived its immunity from suit or consented to be sued.

2. The complaint shows that the plaintiff seeks recovery of a total of \$16,297.96 paid as income and excess profits taxes and interest for the years 1943, 1944 and 1945, composed of the following sums:—

\$3,318.87 (Complaint, p. 8)

4,382.99 (Complaint, p. 17)

6,531.19 (Complaint, p. 21)

2,064.91 (Complaint, pp. 23-24)

13. The complaint further shows that the taxes and interest involved herein were "paid on July 22, 1948, to defendant's Collector of Internal Revenue for the First District of Missouri at St. Louis, Missouri" (Complaint, pp. 1, 9, 17, 18, 22).

4. The Collector of Internal Revenue for the First District of Missouri at St. Louis was on July 22, 1948, James P. Finnegan. He became Collector on April 1, 1944, and [fol. 26] he has been continuously Collector of said District since April 1, 1944, and is now Collector of said District. He was, therefore, Collector of said District at the time of the commencement of this suit, namely, October 17, 1949. Attached hereto is the affidavit of Thos. E. Copley, Deputy Collector in Charge of the First District of Missouri, at this time. Mr. Copley has been Deputy Collector and Deputy Collector in Charge continuously since March 1, 1935. His said affidavit is made a part hereof.

5. The complaint purports to confer jurisdiction upon the District Court by reference to 28 U. S. C. A., Section 1346 (Complaint, par. 2 in each of Counts I, II, III and IV). This section upon which plaintiff relies provides that if the claim exceeds \$10,000.00 and if the Collector of Internal Revenue by whom such tax, penalty or sum is collected is dead, or is not in office as Collector of Internal Revenue when such action is commenced, there is jurisdiction. However, James P. Finnegan, Collector, was not dead and was in office as Collector of Internal Revenue when he collected the tax, penalty or sum mentioned in the complaint and also when this action was commenced.

DRAKE WATSON,

United States Attorney,

WM. V. O'DONNELL,

Assistant United States Attorney.

[fol. 27] Affidavit of Thos. E. Copley.

State of Missouri }
City of St. Louis. }

Thos. E. Copley, Deputy Collector in Charge for the First District of Missouri at this time, being duly sworn upon his oath, says:—

I am at this time Deputy Collector in Charge for the First District of Missouri and have been a Deputy Collector and Deputy Collector in Charge at other times since March 1, 1935.

James P. Finnegan became Collector for the First District of Missouri on April 1, 1944, and he has been in office as such Collector since such date and is now in such office. Therefore, he was Collector of Internal Revenue for the First District of Missouri on July 22, 1948, when there was paid to him the income and excess profits taxes and interest for the years 1943, 1944 and 1945 by International Building Company. He was also in office as Collector of Internal Revenue for said District on October 17, 1949.

THOS. E. COPLEY.

Subscribed and sworn to before me this 16th day of February, 1950.

(Seal)

JAMES J. O'CONNOR,
Clerk, U. S. District Court,

By: VIOLA MOTTAZ,
Deputy Clerk.

[fol. 28] (Memorandum and Order on Overruling of Motion
of Defendant to Dismiss.)

(Filed in U. S. District Court on March 16, 1950.)

In the United States District Court
Eastern District of Missouri
Eastern Division.

International Building Company,
a corporation,

Plaintiff,

vs.

No. 6790.

United States of America,

Defendant.

Hulen, Judge.

The defendant's contention that the claims for taxes set out in the four counts of the complaint will be combined as to amount, for the purpose of depriving this Court of jurisdiction, because the claims total in excess of \$10,000.00, we cannot agree with on authority of *Oliver vs. United States*, 149 F. (2d) 727. Further application of the rule that each claim for taxes for separate years is one action is found in *Sutcliffe Storage Company vs. United States*, 162 F. (2d) 849. If the *Powell* case (123 F. [2d] 473) states a different rule it has not been followed by the later cases.

The ~~suit~~ being for less than \$10,000.00 as to each "claim" or count, this Court has jurisdiction under Section 1346 (1), Title 28, U. S. C. See *Sutcliffe Storage & Warehouse Co. vs. United States*, supra.

Order.

Motion of defendant to dismiss is overruled.

RUBEY M. HULEN,

Judge.

[fol. 29]

Answer.

(Filed in U. S. District Court on March 24, 1950.)

Defense to Count I.

1. Admitted.

2. Denied. The defendant avers that plaintiff's complaint seeks recovery of an amount in excess of \$10,000 which was paid to a Collector of Internal Revenue, who was in office at the time this action was commenced, and, hence, this action cannot be maintained against the United States in this Court on the ground of lack of jurisdiction. James P. Finnegan took office as Collector of Internal Revenue on April, 1944, and is still in office and the taxes involved herein were paid on July 22, 1948.

3. Admitted, except it is denied that the assessment was erroneously and illegally made.

4. Admitted.

5. The allegations contained in paragraph 5 of Count I of the complaint are admitted, except that the defendant is without knowledge and information sufficient to form a belief as to the truth of the allegations regarding the extent to which the building was completed and the extent to which it was occupied.

[fol. 30] 6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of Count I of the complaint.

7. Admitted, except it is denied that the deductions referred to in paragraph 7 of Count I of the complaint were illegally and erroneously disallowed and it is denied that the resulting overdepreciation was erroneously arrived at. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation regarding the amount of the plaintiff's investment in the building or the percentage relationship between the alleged \$12,500 and the alleged investment.

8. Denied.

9. Denied.

10. Denied.

11. Denied, except that the following specific admissions only are made: It is admitted that from 1920 to 1932, inclusive, plaintiff took and was allowed depreciation on \$860,000. It is admitted that the Commissioner assessed a deficiency in tax against the plaintiff for the year 1933 and addressed a deficiency letter to the plaintiff containing the matters alleged in paragraph 11 of Count I of the complaint. It is admitted that the plaintiff took the 1933 assessment to the Board of Tax Appeals as alleged. It is admitted that the plaintiff continued for the years 1934 to 1939, inclusive, to take depreciation on the basis of \$860,000 alleged invested capital. It is admitted that the Commissioner assessed a deficiency in tax against the plaintiff for the years 1938 and 1939 and addressed a deficiency letter to the plaintiff containing the matters alleged. It is admitted that the plaintiff took the 1938 and 1939 assessments to the Board of Tax Appeals. It is admitted that in both appeals to the Board of Tax Appeals the plaintiff made the allegations set forth in paragraph 11 of Count I of the complaint, but the said allegations made in plaintiff's petitions before the Board of Tax [fol. 31] Appeals are specifically herein denied. It is admitted that stipulations between the Commissioner and the plaintiff in both appeals were filed with the Tax Court of the United States; that there were no deficiencies in tax due from the plaintiff for the years 1933, 1938 and 1939; and it is admitted that on October 17, 1944, judgments were entered to the same effect.

Wherefore, defendant demands judgment dismissing Count I of the complaint with costs and disbursements of this action.

Defense to Count II.

1. Admitted.

2. Denied. The defendant avers that plaintiff's complaint seeks recovery of an amount in excess of \$10,000 which was paid to a Collector of Internal Revenue, who was in office at the time this action was commenced, and hence, this action cannot be maintained against the United States in this Court on the ground of lack of jurisdiction.

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James P. Finnegan took office as Collector of Internal Revenue on April 1, 1944, and is still in office and the taxes involved herein were paid on July 22, 1948.

3. Admitted, except it is denied that the assessment was erroneously and illegally made.

4. Admitted.

5. The allegations contained in paragraph 5 of Count II of the complaint are admitted, except that the defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the extent to which the building was completed and the extent to which it was occupied.

6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of Count II of the complaint.

7. Admitted, except it is denied that the deductions referred to in paragraph 7 of Count II of the complaint were illegally and erroneously disallowed and it is denied that the resulting overdepreciation was erroneously arrived at. [fol. 32] Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation regarding the amount of the plaintiff's investment in the building or the percentage relationship between the alleged \$12,500 and the alleged investment.

8. Denied.

9. Denied.

10. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of Count II of the complaint, except it is admitted that in its 1944 return the plaintiff took credit for professional fees of \$7,072.50 which included the sum of \$6,360 paid as fees to the persons and in the amounts set forth in paragraph 10 of Count II of the complaint. It is admitted that the Commissioner disallowed the sum of \$6,360 as a deduction, but it is denied that such disallowance was erroneous or illegal. It is further denied that these fees of \$6,360 were properly deductible as ordinary and necessary expense under Section 23 (a) (1) of the Revenue Act as alleged.

11. For answer to paragraph 11 of Count II of the complaint the defendant repeats and reaffirms the responses contained in paragraph 11 of Defense to Count I of the answer as though fully set forth herein.

Wherefore, defendant demands judgment dismissing Count II of the complaint with costs and disbursements of this action.

Defense to Count III.

1. Admitted.

2. Denied. The defendant avers that plaintiff's complaint seeks recovery of an amount in excess of \$10,000 which was paid to a Collector of Internal Revenue, who was in office at the time this action was commenced, and, hence this action cannot be maintained against the United States in this Court on the ground of lack of jurisdiction. James P. Finnegan took office as Collector of Internal Revenue on April 1, 1944, and is still in office and the [fol. 33] taxes involved herein were paid on July 22, 1948.

3. Admitted, except it is denied that the assessments were erroneously and illegally made.

4. Admitted.

5. For answer to paragraph 5 of Count III of the complaint defendant repeats and reaffirms the responses contained in paragraph 5 to 11, inclusive, of Defenses to Counts I and II of the answer as though fully set forth herein.

6. Admitted, except it is denied that the deductions were illegally and erroneously disallowed.

7. Denied.

8. Denied.

9. Answering paragraph 9 of Count III of the complaint, it is admitted that the Commissioner disallowed all of the deductions taken for 1943 and 1944 as set forth in paragraph 9 of Count III of the complaint and it is admitted that the Commissioner computed the plaintiff's normal tax net income for 1945 at \$23,962.40 and not \$7,168.87 as reported in plaintiff's 1945 return. It is denied that any of the action taken by the Commissioner was erroneous or

illegal. All other allegations of Paragraph 9 of Count III of the complaint are denied, except insofar as they may have already been admitted in other paragraphs of the answer.

10. Denied, except it is admitted that the Commissioner computed a net income for declared value excess profits tax for 1945 of \$27,195.39.

11. Denied.

Wherefore, defendant demands judgment dismissing Count III of the complaint with costs and disbursements of this action.

Defense to Count IV.

1. Admitted.

2. Denied. The defendant avers that plaintiff's complaint seeks recovery of an amount in excess of \$10,000 which was paid to a Collector of Internal Revenue, who was in office at the time this action was commenced, and, hence, this action cannot be maintained against the United States in this Court on the ground of lack of jurisdiction. [fol. 34] James P. Finnegan took office as Collector of Internal Revenue on April 1, 1944, and is still in office and the taxes involved herein were paid on July 22, 1948.

3. Admitted, except it is denied that the assessment was erroneously and illegally made.

4. Admitted.

5. For answer to paragraph 5 of Count IV of the complaint defendant repeats and reaffirms the responses contained in paragraphs 5 to 11, inclusive, of Defenses to Counts I, II, and III of the answer as though fully set forth herein.

6. Denied, except it is admitted that the Commissioner determined that the equity invested capital at the beginning of the year 1945 was \$130,000 and that average borrowed invested capital was \$74,606.50, totaling \$204,606.50, on which total the Commissioner allowed 8 percent as excess profits credit.

Wherefore, defendant demands judgment dismissing Count IV of the complaint with costs and disbursements of this action.

HERBERT H. FREER,

Assistant United States Attorney.

WILLIAM V. O'DONNELL,

Assistant United States Attorney.

[fol. 35] Transcript of Evidence and Proceedings.

District Court of the United States
Eastern District of Missouri.
Eastern Division.

International Building Company,
a corporation,

Plaintiff,

vs.

United States of America,

Defendant.

Civil Action
No. 6790.
Court No. 2.

At the trial of the above numbered and entitled cause,
beginning on November 8, 1950, before
Honorable Rubey M. Hulen,
Judge.

Appearances:

For Plaintiff, Malcolm I. Frank, 320 North 4th St., St.
Louis 2, Mo.

For Defendant, Clarence J. Nickman, Special Assistant to
the Attorney General, Tax Division, Department of
Justice, Washington, D. C.

[fol. 36] Counsel for both parties offered and filed a joint stipulation entitled, "Stipulation and Agreement as to Certain Facts", together with exhibits attached thereto to be received as evidence, subject to the right of either

party to enter objections upon the grounds of immateriality, irrelevancy, incompetency, and subject to the further right of either party to introduce other and further evidence, said stipulation is as follows:

"Stipulation and Agreement as to Certain Facts.

The parties by their respective counsel hereby stipulate that the following facts may be taken as true and together with the exhibits, which are annexed hereto and incorporated herein as a part hereof and individually marked for identification, shall be received in evidence in this cause, subject to the right of either party to enter objections upon the grounds of immateriality, irrelevancy and/or incompetency and subject to the further right of either party to introduce other and further evidence not inconsistent herewith:

1. This action arises under the internal revenue laws of the United States and is brought by the taxpayer corporation for the recovery of additional taxes and interest assessed and paid for the years 1943, 1944, and 1945 aggregating \$16,297.96.

2. Taxpayer filed timely corporation income and declared value excess profits tax returns for the calendar years 1943, 1944 and 1945 and an excess profits tax return for 1945.

3. Subsequently, after examination of these returns, the Commissioner of Internal Revenue determined deficiencies in taxes and interest as follows:

Year	Kind of Tax	Tax	Interest	Total
1943	Income	\$ 2,633.68	\$ 685.19	\$ 3,318.87
1944	Income	3,651.99	731.00	4,382.99
1945	Income	4,613.50	646.65	5,260.15
1945	Declared Value			
	[Excise] Profits ...	1,114.79	156.25	1,271.04
1945	Excess Profits	1,811.06	253.85	2,064.91
Total.....		\$13,825.02	\$2,472.94	\$16,297.96

4. All of these assessments described in paragraph 3, supra, were paid on July 22, 1948, and appropriate claims for refund of each and all of these amounts were timely filed and duly rejected by the Commissioner of Internal Revenue on October 13, 1949.

[fol. 37] 5. The deficiency assessments arose out of certain disallowances determined by the Commissioner as follows:

Item	1943	1944	1945
1. Depreciation	\$12,500.00	\$12,500.00	\$12,500.00
2. Capital stock tax.....	187.50		187.50
3. Professional fees		6,360.00	
4. Net Operating loss deduction.			7,339.02

6. The disallowances referred to in paragraph 5, supra, were these:

(a) In its 1943 return, taxpayer showed a net loss of \$2,562.78. In arriving at such net loss a deduction was claimed for depreciation in the amount of \$12,500 and for Capital stock tax of \$187.50, both of which were disallowed.

(b) In its 1944 return, taxpayer showed a net loss of \$4,776.24. In arriving at such net loss a deduction was again claimed for depreciation of \$12,500, which was disallowed, and for the expenditure of professional fees of \$7,072.50 of which \$6,360 was disallowed.

(c) In its 1945-income tax return, taxpayer reported a net income of \$7,168.87. In arriving at this net income a deduction was claimed for depreciation again in the amount of \$12,500 and a net operating loss was carried forward from 1943 in the amount of \$2,562.78 and from 1944 in the amount of \$4,776.24, making a total loss claimed of \$7,339.02. The item of \$187.50 was taken as a 1945 deduction. All of these deductions taken in 1945, viz., depreciation, capital stock tax and net operating loss, were disallowed.

7. The Commissioner's grounds for disallowance in each instance were as follows:

(a) *Depreciation.*

The amount of \$12,500 claimed as depreciation in each of the years 1943, 1944 and 1945 was disallowed on the ground that all of the depreciable costs had been returned through depreciation allowed or allowable in prior years up to the beginning of the year 1943. The Commissioner reached this determination in accordance with the recitals in paragraph 16, infra.

(b) *Capital Stock Tax.*

The taxpayer was on an [accrual] basis at all times involved herein.

1. During part of the year 1942 and all of 1943 the taxpayer's property was being operated by a trustee under a Chapter X proceeding of the Bankruptcy Act. During the year 1943 the said trustee paid the sum of \$187.50 for capital stock tax, and deducted said sum on its tax return for the year 1943. The Commissioner disallowed the deduction on the ground that the tax paid in 1943 should have been accrued and deducted in 1942. Taxpayer contends that the deduction should be allowed in the year it was paid, namely, 1943.

2. During the year 1944 no capital stock tax was paid, but the Commissioner allowed a deduction of \$187.50 because the taxpayer paid that sum during the year 1945.

3. During the year 1945 the taxpayer paid the sum of \$187.50 for capital stock tax and deducted said sum on its tax return for the year 1945. The Commissioner disallowed the deduction on the ground that the tax paid in 1945 should have been accrued for and deducted in 1944. Taxpayer contends that the deduction should be allowed in the year it was paid, namely, 1945.

(c) *Professional Fees.*

The Commissioner also disallowed for the year 1944 the sum of \$6,360 claimed as a deduction for legal fees paid by the taxpayer in connection with its proceedings in the United States District Court under Chapter X of the Federal Bankruptcy Act. The Commissioner ruled that these fees were not deductible under Section 23 of the Internal Revenue Code.

(d) *Net Operating Loss Deduction.*

The amount of \$7,339.02 claimed as a net operating loss carry-over to 1945 was disallowed as a deduction on the ground that the net loss reported for the year 1943, viz., \$2,562.78, had been converted into a net income in the amount of \$10,124.22 by the disallowance of depreciation.

of \$12,500 and capital stock tax of \$187.50. For the year 1944 the Commissioner determined that the net loss reported, viz., \$4,776.24 had been converted into a net income in the amount of \$13,896.26 by the disallowance of depreciation of \$12,500, professional fees of \$6,360 and the allowance of an additional deduction of \$187.50 for capital stock tax.

(e) *Equity Invested Capital.*

In its excess profits tax return for 1945, taxpayer re-[fol. 39] ported an equity invested capital of \$300,000, i. e., amount paid in for stock, plus \$74,606.50 borrowed capital, totaling \$374,606.50, on which 8 percent credit was claimed as allowable. Taxpayer claims to be entitled to the same unused carryover credit from the years 1943 and 1944 and, hence, claims no excess profits tax is due. The Commissioner, on the other hand, determined that the equity invested capital at the beginning of 1945 was \$130,000, i. e., \$430,000, May 1, 1913, basis of building (as found by Commissioner), less mortgage assumed of \$300,000, and that average borrowed capital was \$74,606.50, totaling \$204,606.50, on which 8 percent credit was allowed. This determination caused a revision of the excess profits credit and gave rise to a deficiency in excess profits tax for 1945 of \$1,811.06.

8. The taxpayer corporation was organized under the laws of the State of Missouri on April 14, 1913. Shortly thereafter, it acquired the building and leasehold now the subject of this action. The chronological steps leading to the creation of the leasehold and the erection of the building and their ultimate acquisition by the taxpayer corporation reach back to 1905 and are recited in paragraphs 8 to 12, inclusive, hereof. On December 27, 1905, the Liggett Realty Company, leased to the November Investment Company, a plot of ground located at the present site of the International Building pursuant to the agreement of lease annexed hereto marked Exhibit T. The plot of ground is in Block 84, fronting 115 feet on Chestnut Street by 109 feet on Eighth Street. The lease which was for 99 years was to begin January 1, 1906, and to expire on December 31, 2004.

• (a) Under the terms of the lease the annual rental is \$20,000, payable in equal quarterly installments of \$5,000 on the first day of January, April, July and October, and, in addition, the lessee is to pay all taxes. If the lessee should fail to pay the taxes on the land, it is provided that the lessor may pay them and be entitled to be reimbursed by the lessee, with interest on the same at 8 percent from the time of the payment of the taxes until the date the lessor is reimbursed. All of the unpaid rentals are to bear an 8 percent interest rate from the date due until paid. Provision is also made that the lease may be assigned but such assignees and the original lessor are to be bound by the terms applicable to the original parties to the lease. The lease may be forfeited by failure to comply with all of the terms thereof and after sixty (60) days from the [fol. 40] date of a written notice, the lessor may recover the property. The annual rental may be doubled for every day the leased property is occupied after the expiration of the 99 years or after any forfeiture date. In case of any forfeiture, the lessor may forthwith take possession of the premises with all improvements thereon.

(b) The lessee was to build on the leasehold, at its own expense, a building not less than 14 stories high of fire-proof construction suitable for office purposes, and at a cost to the lessee of not less than \$600,000. The building was to be completed within two years from December 1, 1905. The lessee was to maintain the building over the term of the lease at its own expense. Any improvements made to the leased land must be kept in good condition thereafter for the term of the lease. The lessee was to be liable for paying the entire cost of constructing the building and any repairs or improvements.

9. On January 21, 1906, the November Investment Company issued 5 percent bonds in the principal sum of \$450,000, secured by a first mortgage on the leasehold and on the building to be constructed. These bonds were underwritten by the Missouri Lincoln Trust Company. On July 25, 1907, the November Investment Company sold the leasehold and building to the West End Realty Company, a subsidiary of Missouri Lincoln Trust Company for a consideration stated in the deed of \$775,000.00.

10. On or about October 7, 1907, the West End Realty Company borrowed for a term of two years the sum of \$211,080 from the Missouri Lincoln Trust Company, giving a second deed of trust on the leasehold and uncompleted building. On October 7, 1908, after the West End Realty Company defaulted on its payments, the Missouri Lincoln Trust Company foreclosed on the property at which time it was bought by the Nina Realty Company, a subsidiary of the Missouri Lincoln Trust Company for the amount of \$25,000.00.

11. On April 14, 1913, the Missouri Lincoln Trust Company organized the International Building Company, the taxpayer corporation herein. The latter then acquired the 99-year leasehold and building thereon from the Nina Realty Company by quitclaim deed dated April 26, 1913, and recorded May 1, 1913. A release of the first deed of trust securing the November Investment Company bond issue was executed and filed.

[fol. 41] (a) The consideration stated in minutes of taxpayer and given for this transfer was all of the authorized capital stock and bonds of the taxpayer corporation consisting of 6000 shares of common stock (par value \$50 per share) issued May 1, 1913, and \$300,000 face value of 6 percent first mortgage bonds secured by a first mortgage trust indenture executed by the taxpayer corporation on May 1, 1913, covering the said leasehold and building.

(b) Half the bond issue, viz., \$150,000 face value of bonds were sold at face value to International Life Insurance Company at date of issuance, viz., May 1, 1913. After the receipt of the stock of taxpayer company, Missouri Lincoln Trust Company on May 20, 1913, offered all of such stock to its own (Missouri Lincoln Trust Company) stockholders by subscription at \$18 per share up to October 21, 1913, on which date subscriptions were closed. Copy of the offering is annexed hereto and made a part hereof marked Exhibit U. Only 434 shares were sold at that price, the certificates therefor being issued under dates of November 1, 5 and 7, 1913. Unsold shares of the taxpayer company held by Missouri Lincoln Trust Company were entered among its assets at \$16.56 per share,

a total of \$92,656.00 on the Missouri Lincoln Company books, on January 26, 1917.

(c) After receipt of the stock and bonds of taxpayer company, the Board of Directors of Missouri Lincoln Trust Company on May 14, 1913, authorized its accounting department to credit its bond account with \$300,000.00 on account of the bonds of taxpayer company, and its stock account with \$100,000.00 on account of the stock of the taxpayer company, as evidenced by the minutes of the meeting of May 14, 1913, copy of which is annexed hereto and made a part hereof, marked Exhibit V.

12. (a) The building on the leasehold is 17 stories high with a basement and is of fire-proof construction. It is presently served by five elevators and is ell-shaped. At the time of the Commissioner's determination, the records of the office of the City Assessor of St. Louis showed the content of the building to be 1,648,800 cubic feet. On or about November 3, 1950, registered architect John Wunderlich, on behalf of the taxpayer measured the building and reported its content to be 1,856,765 cubic feet and would so testify. When the building was first erected on [fol. 42] the leased land in 1907 it was known as the Liggett Building. Later, when the International Life Insurance Company became a tenant in the building on July 1, 1913, the name was changed to the International Life Building. This change of name was made pursuant to the contract of lease dated April 5, 1913, copy of which is annexed hereto and made a part hereof marked Exhibit A. When the International Life Insurance Company went out of business and removed from the building, the name was changed to, and it still is known as, the International Building.

(b) This building was erected during 1906 and 1907 and its cost was \$575,000.00. According to its refund claims and complaint, the taxpayer claims that this amount was exclusive of finishing the upper eleven floors and installing a heating plant and fifth elevator. The taxpayer further claims that the cost of these three items to it was \$260,000, allegedly expended after May 1, 1913, the date of its acquisition.

(c) **Finishing Upper Floors.** If called to testify in this case, J. K. Gregg, formerly manager of the building over a long period of years and later Secretary of the taxpayer company, if living and otherwise available, would testify that he was personally in charge of the work of finishing the upper eleven floors, and that he personally knows that the cost thereof was approximately \$165,000.00 and that it was done before May 1, 1913.

Heating Plant, Fifth Elevator and Other Miscellaneous Capital Additions.

(d) The following items were claimed on tax returns as expense but were disallowed in audit on the ground that they were capital expenditures subject to depreciation at the rate determined by the life indicated in each case, to-wit:

Year	Item	Amount	Life
1920	Heating Plant	\$11,919.17	10 years
1921	Pumps (never in issue).....	570.00	10 years
1922	5th Elevator	6,414.67	10 years
1926	Additions to Heating Plant.....	560.00	10 years
1927	Elevator Locks (never in issue)...	3,448.75	10 years
1939	Stoker (never in issue).....	1,946.77	10 years

[fol. 43] Depreciation was allowed in audit on all the above items in some years, although not claimed on tax returns. As of the year 1943 only the cost of stoker bought in 1939 was incompletely recovered through depreciation allowed or allowable on prior returns. Depreciation was allowed on cost of stoker.

Of the above items, those of 1920, heating plant, 1922, fifth elevator, and 1926 addition to heating plant were items included in the \$260,000.00 claimed as capital additions to basis of the Building for purposes of depreciation but since they have been fully depreciated to exhaustion, for the purposes of this action, it is conceded that none of these items are allowable capital additions.

(e) It is mutually agreed that for the purposes of this action, the depreciation rate should be 2% per annum.

(f) **Depreciation Allowed or Allowable.**

From acquisition May 1, 1913, to December 31, 1919, no depreciation was claimed on plaintiff's tax returns but

the amount allowable comprised six and two-third (6-2/3) years at 2 percent (2%) per annum or thirteen and one-half percent (13½%) of the basis as of May 1, 1913. Upon the basis of the Commissioner's determination of \$430,000.00 this amount would be \$57,333.00.

There was claimed on tax returns and allowed depreciation on the property in question as follows, to-wit:

Period	No. of Yrs.	Depreciation Per Year	Claimed Amount	Depreciation Per Year	Allowed Amount
1/1/20 to 12/31/21	2	\$21,500.00	\$ 43,000.00	\$17,200.00	\$ 34,000.00
1/1/22 to 12/31/32	11	21,500.00 (Except 1925) 18,448.92	233,448.92	21,500.00	236,500.00
1/1/33 to 12/31/40	8	15,000.00	120,000.00	15,000.00	120,000.00
1/1/41 to 12/31/42	2	12,500.00	25,000.00	12,500.00	25,000.00
12/31/42	Totals		\$412,848.92		\$415,900.00

During this period the amounts claimed each year were in excess of the amounts allowable at the rate of 2% on basis.

[fol. 44] The adjustment to basis, as of January 1, 1943, required by the Internal Revenue Code, comprises the sum of the depreciation allowable prior to 1920 as stated above and the depreciation claimed and allowed during 1920 to 1942, both inclusive, as tabulated above. On the basis of \$430,000.00 determined by the Commissioner the total adjustment is \$473,233.00.

If the taxpayer's contention is found to be correct, then there remains an undepreciated value of the building in such sum as may be computed as predicated upon the Court's findings as to basis for depreciation.

(g) The only asset which the plaintiff company had at its incorporation and on May 1, 1913, was the leasehold estate subject to a bond issue of \$300,000.

(h) The leasehold was assessed in 1913 by the City Assessor of St. Louis as follows:

Land	\$165,000.00
Building	400,000.00

13. During the year 1941 taxpayer paid \$10,383.00 on account of special benefit assessment taxes levied by the City of St. Louis for improvement districts in which its leasehold is located. This sum was claimed by taxpayer as a further capital addition to the basis of depreciation of its building resulting in a claimed total of \$870,383.00. It is conceded that this item of \$10,383.00 actually constitutes a capital expenditure on the leasehold and should be amortized over the remaining life of the leasehold, i. e., over 63 years starting with the taxable year 1942. No amortization of this sum was claimed or allowed in 1942.

14. The net income from operation of the Building by taxpayer company prior to 1920 when control was purchased by Henri Chouteau and the net income in subsequent years from 1920 to 1949 is set forth in the following tables:

[fol, 45]

Net Income From Operations of International Building
Computed From Tax Returns.

Year	Rentals	* Expenses	Net Income From Building
Table 1: 1913-1919.			
5-1-13 - 12-31-13 †	(?)	(?)	\$ 8,710.07 †
1913 (prorate)	(?)	(?)	\$ 13,065.10
1914	\$ 98,038.55	\$ 73,933.52	24,105.03
1915	94,814.25	71,314.91	23,499.34
1916	93,423.41	71,064.70	22,358.71
1917	89,951.84	74,774.62	15,177.22
1918	91,027.38	75,011.28	16,016.10
1919	107,050.36	89,150.79	17,899.57

* In above years no depreciation was claimed on returns and no salaries were paid to officers of the corporation. Expenses include salary of manager of the building at \$4000 per year.

† Derived from statement of loss in 1913 on 1914 return.

Average Net Income From Building.

1913 to 1916 (both inclusive) First Four Years	\$20,223.66
1913 to 1919 (both inclusive) First Seven Years	18,874.44
1914 to 1919 (both inclusive) Six Years	19,842.66
1917 to 1919 (both inclusive) Last Three Years above..	16,364.30

Table 2: 1920-1949.

1920	\$143,230.97	\$ 79,067.44	\$ 64,163.53
1921	168,159.56	105,610.72	62,548.84
1922	175,187.75	102,251.57	72,936.18
1923	205,983.76	103,208.54	102,775.22
1924	221,171.14	100,334.97	120,836.17
1925	195,768.61	109,482.68	86,285.93
1926	207,704.24	106,094.37	101,609.87
1927	201,314.29	109,577.94	91,736.35
1928	204,863.31	104,912.59	99,950.72
1929	179,663.91	115,144.44	64,519.47
1930	161,284.04	112,277.29	49,006.75
1931	160,634.92	93,446.45	67,188.47
1932	122,611.83	76,629.93	45,981.90
1933	107,314.77	71,691.60	35,623.17
1934	96,736.13	75,697.20	21,038.93
1935	91,592.76	74,618.79	16,973.97
1936	95,554.81	74,192.17	21,362.64
1937	98,774.26	76,745.27	22,028.99
1938	105,517.33	77,009.66	28,507.67
1939	108,011.50	77,106.67	30,904.83
1940	103,205.22	78,595.04	24,610.18
1941	100,647.70	78,373.41	22,274.29
1942	105,021.70	80,005.58	25,016.12
1943	104,786.24	81,740.32	23,045.92
1944	118,408.32	101,125.12	17,283.20
1945	134,721.56	106,956.91	27,764.65

[fol. 46]

1946	176,625.63	107,795.34	68,830.29
1947	207,495.48	116,931.69	90,563.79
1948	221,915.74	123,675.53	98,240.21
1949	219,434.36	119,590.92	99,843.44

All expenses of building operation comprising all expenses on tax returns, except depreciation, interest and officers' salaries. Salary of Manager of the building is included.

15. The opening entry on the books of the taxpayer corporation was as follows:

Debit—Leasehold	\$600,000	
Credit—Mortgage		\$300,000
Capital stock		\$300,000

The cost of the building as shown on taxpayer's original balance sheet was \$600,000 and continued to be shown in that amount until 1941. The return filed by the taxpayer for 1941 includes a balance sheet as of December 31, 1941, which is the first one that shows an investment in depreciable assets in excess of \$600,000. That balance sheet sets up depreciable assets of \$870,383 with a depreciation

reserve of \$425,000, leaving an undepreciated cost at the end of 1941 of \$445,383.

No depreciation was claimed on the building for any year prior to 1920. However, beginning in 1920 the taxpayer corporation claimed an original depreciable basis for income tax purposes of \$860,000. This basis was claimed for all years from 1920 to 1939 and the taxpayer also claimed that subsequent to 1939 it was entitled to a basis of \$870,383 for depreciation. On this stated basis taxpayer took deductions for depreciation of \$12,500 for each of the years in suit. The taxpayer corporation claimed such basis as follows:

Stated consideration given by taxpayer for leasehold and building in stock (6000 shares at \$50 par value).....	\$300,000
First mortgage bonds of taxpayer at face value of.....	300,000
Claimed cost to taxpayer to complete top eleven floors of building, installing a fifth elevator and a heating plant.	260,000
Claimed as total cost.....	\$860,000
Subsequent permanent additions to the building at a claimed cost totaling (after 1939).....	10,383
Grand total cost claimed as basis.....	\$870,383

[fol. 47] 16. The Commissioner of Internal Revenue disallowed the amount of \$12,500 as depreciation in each of the years 1943, 1944 and 1945 on the ground that the building had been over-depreciated on December 31, 1942 by \$31,100. That is, the Commissioner had arrived at a May 1, 1913 value for depreciation of \$430,000. However, in the years prior to 1943 there had already been allowed or allowable a total depreciation credit aggregating \$461,100. This determination of the Commissioner was based upon the following computation as set forth in his deficiency letter for additional taxes for 1943, 1944 and 1945:

Valuation of Building for Depreciation.

Reconstruction Value May 1, 1913:

1,648,800 cubic feet @ 46¢ \$593,568
 Less depreciation 1907 to 1913 [4] 2% 71,228

\$522,340

Economic Value:

Average net income between 1914 and 1919
 \$20,000 per year

Average net rental over remaining life of
 building at May 1, 1913, considered to be
 \$22,000 per year.

Total expectancy \$22,000 x 44 years \$986,000

Present value of total expectancy based on
 Hoskold's Formula at 6 & 4% rate gives

\$986,000 x 0.330,990 \$320,400

Total of reproduction cost and economic
 value

\$842,740

Average

\$421,370

Valuation for depreciation May 1, 1913.

\$430,000

Depreciation allowable 1/1/1913 to 12/31/1919

is 7 years @ 2% 60,200

Depreciation allowed 1/1/1920 to 12/31/1932. 270,900

Depreciation allowed 1/1/1933 to 12/31/1940

(7 x \$15,000) = 105,000

Depreciation allowed in 1941 12,500

Depreciation allowed in 1942 12,500

Total allowed and allowable \$461,100

Over-depreciated to 12/31/1942 \$ 31,100

[fol. 48] The Commissioner's foregoing computation was arrived at in this manner:

Reproduction Cost.

To have constructed this building as of May 1, 1913, the cubic foot price was estimated to be 36¢ which when multiplied by the [cubic] foot content of 1,648,800 cubic feet gives a reproduction cost of \$593,568. However, since the estimated life of the building at date of erection was 50 years, and 6 years of the life having passed to the beginning of 1913, the sound value would be 44/50 of \$593,568 or \$522,340.

Economic Value.

The average net income between 1914 and 1919 was around \$20,000 per year. By considering an average net rental of \$22,000 for the remaining life of the building from May 1, 1913 and multiplying the \$22,000 by 44 years, the result is \$968,000 of which the present worth based

upon Hoskold's Formula at a 6 percent risk rate and 4 percent safe rate equals \$320,400. Then by averaging the reproduction cost less depreciation value of \$522,340 and the economic value of \$320,400, an average value was arrived at of \$421,370. Finally, a May 1, 1913, value of \$430,000 was determined by the Commissioner as the basis for depreciation.

Commissioner's Valuation of the Leasehold.

The deficiency letter assigned a valuation to the building only and did not state any value for the interest in the land or leasehold thereon.

17. On April 2, 1920, Henri Chouteau purchased all of the outstanding capital stock of the taxpayer corporation for \$82,000 subject to an outstanding bonded indebtedness of \$265,000.

18. *Facts relating to the years before the Board of Tax Appeals:*

(a) For the year 1933 the Commissioner of Internal Revenue assessed a deficiency in income tax against taxpayer by determining the basis of the leasehold for depreciation to be \$385,000 on May 1, 1913 (date of its purchase by taxpayer). The latter amount, less depreciation already taken, was amortized over the then remaining 72 years life of the lease and an annual deduction for depreciation was arrived at amounting to \$1,195.83. This computation by the Commissioner was made as follows:

[fol. 49]

Leasehold value on May 1, 1913.....	\$385,000.00
Amortization sustained for 6-2/3 years from May 1, 1913, to Dec. 31, 1919, on the remaining term of 91-2/3 years.....	\$ 28,000
Amortization allowed for 1920 to 1932.....	270,900
Total allowed or allowable.....	298,900.00
Remaining value of leasehold at Jan. 1, 1933, to be amortized	86,100.00
Remaining life of lease at Jan. 1, 1933—72 years.	
Annual deduction allowed for amortization.....	\$ 1,195.83

Taxpayer filed a petition (Docket No. 104020) to review said tax assessment by appeal to the Board of Tax Appeals (now the Tax Court of the United States).

(b) For the years 1938 and 1939, the Commissioner again assessed a deficiency in income tax against taxpayer by determining the basis of the leasehold for depreciation to be \$385,000 on May 1, 1913, as stated above. The latter amount, less depreciation already taken, was amortized over the remaining life of the lease. Taxpayer again filed a petition (Docket No. 105807) to review said tax assessment by appeal to the Board of Tax Appeals (now the Tax Court of the United States).

(c) In both of the aforesaid petitions to the Board of Tax Appeals the taxpayer alleged the basis of the building for depreciation purposes to be \$860,000 and depreciation to be taken over the remaining useful life of the building, being 45 years from May 1, 1913 (date of its purchase). In both of said petitions the allegations made by the taxpayer as to valuation for depreciation were the same and those allegations are the same (although in different language) as the allegations relating to valuation for depreciation in taxpayer's present complaint. The issue involving valuation for depreciation purposes, which is to be determined in the instant case is the same issue set forth in the petitions before the Board of Tax Appeals, except for different tax years, viz., the basis for depreciation purposes and the useful life of the building.

(d) On November 12, 1941, the taxpayer filed in the United States District Court, Eastern District of Missouri, a petition under Chapter X of the Federal Bankruptcy Act. In that proceeding, the Collector of Internal Revenue filed proof of claim for additional income taxes and interest for the years 1933, 1938, 1939 and 1941. Objections to the [fol. 50] Government's claim were filed on January 1, 1944. Deductions were claimed for depreciation and allowed as follows:

Year	Claimed	Disallowed
1933	\$21,500.00	\$20,304.17
1938	15,000.00	13,804.17
1939	15,000.00	13,804.17
1941	12,500.00	11,109.49

(e) The petition referred to in subparagraph (d) supra eventually resulted in the issuance of a court order entitled "Order Confirming Amended Plan of Reorganization Proposed by Debtor and Jane B. Chouteau Its Majority

"Stockholder," approved on October 7, 1944, copy of which is annexed hereto and made a part hereof marked Exhibit X.

In connection with said proceedings a stipulation was filed on October 7, 1944, in the United States District Court covering the years 1933, 1938, 1939 and 1941 under which the Government withdrew its claim for additional taxes and interest for the latter years without prejudice. Copy of that stipulation is annexed hereto and made a part hereof marked Exhibit B.

(f) On October 11, 1944, both of the appeals to the Board of Tax Appeals were settled by stipulations that there were no deficiencies. In both of these cases no hearings were held or argument made upon the issues, and no stipulation of facts entered into nor briefs filed. Copies of the stipulations filed are annexed hereto and made a part hereof marked Exhibits C and D, respectively. Thereafter, on October 17, 1944, the Tax Court in each of the cases, pursuant to the aforesaid stipulations, entered orders and decisions that no deficiencies in income taxes were due for 1933, 1938 and 1939. Copies of these orders are annexed hereto and made a part hereof marked Exhibits C-1 and D-1, respectively.

19. *Facts relating to the disallowance of professional fees.*

In November, 1941, the indenture trustee under the deed of trust securing payment of the mortgage bonds, filed suit in the Circuit Court of the City of St. Louis requesting foreclosure of the deed of trust for failure to pay a balance of the bonds which were then past maturity. On November 12, 1941, taxpayer filed in the United States District Court the petition under Chapter X referred to [fol. 51] above in order to save its property from foreclosure. Under these proceedings and as the result of a new loan the mortgage bonds were paid and fees for legal and other services were ordered by the court to be paid as part of the expenses thereof, to the following persons:

Herman Katcher, attorney for the bondholders	\$1,250
Barak Mattingly, attorney for Mrs. Jane Chouteau	1,250
Malcolm I. Frank, attorney for the debtor.	2,500
H. A. & R. C. Hamilton, attorneys for trustees	750
Earl Giraldin, Indenture Trustee	610
Total	<u>\$6,360</u>

The expenditures totaling \$6,360 were incurred in order to protect the interest of the bondholders and to complete the refinancing of the taxpayer corporation. Katcher represented the Babler family who held large amounts of the corporation bonds; Mattingly represented Mrs. Jane Chouteau who had approximately 95 percent of the corporation's stock; Frank represented the debtor; Earl Giraldin was trustee in the mortgage indenture and H. A. and R. C. Hamilton were attorneys for the indenture trustee. Taxpayer took deductions for \$7,072.50 as professional fees of which the above \$6,360 was disallowed. The taxpayer claims that this proceeding was of a character which entitles it, under the revenue laws to deduct the fees referred to herein, whereas the defendant contends that the proceeding was of such a nature that such deduction was not authorized under the revenue laws.

20. Copies of the following additional documents are incorporated herein by reference and made a part hereof being marked exhibits as noted:

- Exhibit E Corporation income tax return for 1914
- Exhibit F Corporation income tax return for 1915
- Exhibit G Corporation income tax return for 1916
- Exhibit H Corporation income tax return for 1917
- Exhibit J Corporation income and profits tax return for 1918
- Exhibit K Corporation income and profits tax return for 1919

- Exhibit L Corporation income and profits tax return for 1920
- Exhibit M Corporation income and declared value excess profits tax return for 1941
- Exhibit N Corporation income and declared value excess profits tax return for 1942
- Exhibit O Corporation income and declared value excess profits tax return for 1943
- Exhibit P Corporation income and declared value excess profits tax return for 1944
- Exhibit R Corporation income and declared value excess profits tax return for 1945
- Exhibit R-1 Corporation excess profits tax return for 1945
- Exhibit W Letter from Treasury Department transmitting report of revenue agent for 1927 and other documents.

MALCOLM I. FRANK,
WM. M. FITCH,
Attorneys for Plaintiff.

[fol. 52]

CLARENCE J. NICKMAN,
Special Assistant to the
Attorney General.

[fol. 53]

Index of Exhibits.

- | Exhibit Symbol | Description of Document |
|----------------|--|
| A | Lease from Nina Realty Company to International Life Insurance Company dated April 5, 1913. |
| B | Stipulation covering reorganization proceedings of International Building Company in U. S. District Court. |
| C | Stipulation filed in U. S. Tax Court in Docket No. 104020, covering taxable year 1933. |

DECLARED VALUE EXCESS-PROFITS TAX COMPUTATION. (See Computation Instructions)

Line No.	Column 1	Col. 2 Rate	Column 3 Amount of Tax
1. Net income for declared value excess-profits tax computation (item 31, page 1)	\$ 2562 78		
2. Value of capital stock as declared in your capital stock tax return for the year ended Jan. 20, 1943 (or for year ended June 30, 1944, if your income tax fiscal year begins in 1943 and ended on or after July 31, 1944)	\$		
3. 10 percent of line 2	\$		
4. Dividends received credit (85 percent of column 2, Schedule E, but not in excess of 85 percent of item 37 minus item 38, page 1)	\$		
5. Balance subject to declared value excess-profits tax (line 1 minus total of lines 3 and 4)	\$		
6. Amount taxable at 6.6 percent (5 percent of line 2, but not more than line 5); and tax	\$	6.6%	\$
7. Balance taxable at 13.2 percent (line 5 minus line 6, column 1); and tax	\$	13.2%	\$
8. Total declared value excess-profits tax (total of line 6, column 3, and line 7, column 3)			\$ None

INCOME TAX COMPUTATION. (See Computation Instructions)

NORMAL TAX COMPUTATION DOMESTIC CORPORATIONS WITH NORMAL-TAX NET INCOMES NOT OVER \$25,000			
9. Normal-tax net income (item 40, page 1)	\$ 2562 78		
10. Portion of line 9 (not in excess of \$5,000); and tax at 15 percent	\$	15%	\$
11. Portion of line 9 (in excess of \$5,000 and not in excess of \$20,000); and tax at 17 percent	\$	17%	\$
12. Portion of line 9 (in excess of \$20,000 and not in excess of \$25,000); and tax at 19 percent	\$	19%	\$
13. Portion of line 9 (in excess of \$25,000); and tax at 31 percent	\$	31%	\$
14. Total normal tax (total tax in column 3 of lines 10, 11, 12, and 13)			\$ None

DOMESTIC CORPORATIONS WITH NORMAL-TAX NET INCOMES OF OVER \$25,000 AND FOREIGN CORPORATIONS ENGAGED IN BUSINESS WITHIN THE UNITED STATES IRRESPECTIVE OF AMOUNT OF NORMAL-TAX NET INCOME			
15. Normal-tax net income (item 40, page 1)	\$		
16. Normal tax (24 percent of line 15)	\$	24%	\$

SURTAX COMPUTATION			
17. Net income (item 35, page 1)	\$ 2562 78		
18. Less: Income subject to excess profits tax	\$		
19. Dividends received credit (85 percent of column 2, Schedule E (excluding certain dividends received on preferred stock of a public utility), but not in excess of 85 percent of line 17 minus 18)	\$		
20. Dividends paid on certain preferred stock if taxpayer is a public utility	\$		
21. Surtax net income	\$		

CORPORATIONS WITH SURTAX NET INCOMES NOT OVER \$50,000			
22. Portion of line 21 (not in excess of \$25,000); and tax at 10 percent (or 12 percent in the case of a consolidated return)	\$	10%	\$
23. Portion of line 21 (in excess of \$25,000 and not in excess of \$50,000); and tax at 22 percent (or 24 percent in the case of a consolidated return)	\$	22%	\$
24. Total surtax in column 3 of lines 22 and 23			\$ None

CORPORATIONS WITH SURTAX NET INCOMES OF OVER \$50,000			
25. Surtax net income (line 21 above)	\$		
26. Surtax (16 percent of line 25) (or in the case of a consolidated return, 18 percent of the consolidated surtax net income)	\$	16%	\$
27. Total normal and surtax (line 14 or 16, plus line 24 or 26, whichever is applicable)	\$		\$
28. Total tax (line 27 or line 33, Schedule C)			\$ None

TAX COMPUTATION FOR REGULATED INVESTMENT COMPANIES			
29. Adjusted net income (item 37, page 1, but computed without regard to section 47 (c))	\$		
30. Less: Net operating loss deduction (item 27, page 1)	\$		
31. Total of lines 29 and 30	\$		
32. Less: Amount of net long-term capital gain over short-term capital loss. (From Schedule C)	\$		
33. Adjusted net income (after applying section 362 (b) (1))	\$		

1

Dividends on share accounts in Federal savings and loan associations in case of share accounts issued prior to March 28, 1942, should not be listed, but the amount should be included in line 28 and 29, page 1; dividends on share accounts issued on or after March 28, 1942, should be reported in column 4.

1. Name and Address of Officer

NOTE.—Schedule F-1 (IN DUPLICATE) also must be filed with this return if compensation in excess of \$75,000 was paid to any officer or employee.

1. Taxable Year

1. Check whether deduction claimed represents debts which have become worthless ☐, or is an addition to a reserve ☐.

2. Not including securities which are capital assets and which became worthless within the taxable year. Such securities which became worthless within the year should be reported in Schedule C.

Schedule I.—CONTRIBUTIONS OR GIFTS PAID. (See instruction 23)

Name and Address of Organization		Amount
	\$	
Total. (Enter as item 23, page 1, subject to 5 percent limitation.) (See Instruction 23)	\$	

Exhibit Symbol	Description of Document
C-1	Decision of U. S. Tax Court in Docket No. 104020, covering taxable year 1933.
D	Stipulation filed in U. S. Tax Court in Docket No. 105807, covering taxable years 1938 and 1939.
D-1	Decision of U. S. Tax Court in Docket No. 105807, covering taxable years 1938 and 1939.
E	Corporation income tax return for 1914.
F	Corporation income tax return for 1915.
G	Corporation income tax return for 1916.
H	Corporation income tax return for 1917.
J	Corporation income and profits tax return for 1918.
K	Corporation income and profits tax return for 1919.
L	Corporation income and profits tax return for 1920.
M	Corporation income and declared value excess profits tax return for 1941.
N	Corporation income and declared value excess profits tax return for 1942.
O	Corporation income and declared value excess profits tax return for 1943.
P	Corporation income and declared value excess profits tax return for 1944.
R	Corporation income and declared value excess profits tax return for 1945.
R-1	Corporation excess profits tax return for 1945.
S	Rider attached to 1917 Capital Stock Tax Return of International Building Company.
T	99-year lease from Liggett Realty Company to November Investment Company.
U	Announcement of offering of taxpayer-company's stock by Missouri Lincoln Trust Company.
V	Minutes of meeting of Board of Directors of Missouri-Lincoln Trust Company on May 14, 1913.

Exhibit
SymbolDescription of
Document

- W Letter from Treasury Department transmitting report of revenue agent for 1927 and other documents.
- X Order of the United States District Court approved October 7, 1944.

[fol. 54]

Exhibit B.

In the United States District Court,
Eastern District of Missouri,
Eastern Division.

In the Matter of:

International Building Company,
a corporation,
Debtor.

In Proceedings for
Corporate
Reorganization.
No. 10487
Division No. 1

Stipulation.

This stipulation made and entered into by the United States of America, through James P. Finnegan, Collector of Internal Revenue, Harry C. Blanton, United States Attorney, and Taylor Smith, Jr., Assistant United States Attorney, and Jesse E. Bishop, Trustee for the International Building Company, a corporation, through Malcolm Frank, Attorney for said Trustee,

Whereas, the United States filed its Amended Claim for taxes on the 8th day of October, 1942, which Amended Claim for taxes specified as follows, to-wit:

Nature of Tax and Statute Involved	Year of Taxable Period Ended	Amount of Tax	With Interest at the Rate of 6% Per Annum Until Paid
Income (Addl)	1933 Tax	\$2,188.12	Plus stat. int. from 10-2-42
	Assessed Int.	1,031.29	" " " " "
	Accrued Int.	134.07	" " " " "
Income (Addl)	1938 Tax	61.73	" " " " "
	Assessed Int.	10.57	" " " " "
	Accrued Int.	3.01	" " " " "
Income (Addl)	1939 Tax	500.52	" " " " "
	Assessed Int.	55.71	" " " " "
	Accrued Int.	23.16	" " " " "
Income (Addl)	1941 Tax	847.28	" " " " "
	Assessed Int.	27.78	" " " " "
		\$4,883.24	

It is hereby Stipulated and Agreed by and between the parties hereto that the United States does, by these presents, withdraw said Amended Claim.

[fol. 55] It is further Stipulated and Agreed by and between the parties hereto that the withdrawal of said Amended Claim by the United States is without prejudice and does not constitute a determination of the merits and does not prejudice the rights or remedies of the United States for the collection of Internal Revenue taxes that may be due with respect to any year other than those involved in said Amended Claim, namely, the years of 1933, 1938, 1939 and 1941.

JAMES P. FINNEGAN,
Collector of Internal Revenue.

HARRY C. BLANTON,
United States Attorney.

TAYLOR SMITH, JR.,
Assistant United States Attorney.

MALCOLM I. FRANK,
Attorney for Jesse E. Bishop,
Trustee for International
Building Company, a corporation.

[fol. 56] Exhibit C.

(Filed in the Tax Court of the United States on
October 11, 1944.)

The Tax Court of the United States.

International Building Company,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

Docket No. 104020

Stipulation.

It is hereby stipulated that there is no deficiency in Federal income tax due from the petitioner for the taxable

year, 1933 and that the following statement shows the petitioner's Federal income tax liability for the taxable year 1933:

Tax liability	None
Assessment (Jeopardy):	
January 23, 1942 (not paid)	\$2,188.12
Assessment to be abated	\$2,188.12

WM. M. FITCH,
MALCOLM I. FRANK,
Counsel for Petitioner.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

[fol. 57]

Exhibit C-1.

The Tax Court of the United States.
Washington.

International Building Company,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

Docket No. 104020

Decision.

Under written stipulation signed by counsel for the parties in the above-entitled proceeding and filed with the Court on October 11, 1944, it is

Ordered and Decided: That there is no deficiency in income tax for the calendar year 1933.

J. E. MURDOCK,
Judge.

Enter;

Entered Oct. 17, 1944.

[fol. 58]

Exhibit D.

(Filed in the Tax Court of the United States on
October 11, 1944.)

The Tax Court of the United States.

International Building Company,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

Docket No. 105807

Stipulation.

It is hereby stipulated that there are no deficiencies in Federal income tax due from the petitioner for the taxable years 1938 and 1939 and that the following statement shows the petitioner's Federal income tax liabilities for the taxable years 1938 and 1939:

	1938	
Tax liability		None
Assessment (Jeopardy):		
January 23, 1942 (Not paid)		\$ 61.73
Assessment to be abated		\$ 61.73

	1939	
Tax liability		None
Assessment (Jeopardy):		
January 23, 1942 (Not paid)		\$500.52
Assessment to be abated		\$500.52

WM. M. FITCH,
MALCOLM I. FRANK,
Counsel for Petitioner.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

[fol. 59]

Exhibit D-1.

The Tax Court of the United States.
Washington.

International Building Company,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

Docket No. 105807

Decision.

Under written stipulation signed by counsel for the parties in the above-entitled proceeding and filed with the Court on October 11, 1944, it is

Ordered and Decided: That there are no deficiencies in income tax for the calendar years 1938 and 1939.

J. E. MURDOCK,
Judge.

Enter:

Entered Oct. 17, 1944.

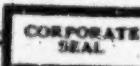
20. Interest	20000 00	
21. Taxes (From Schedule H) (Deduct declared value excess-profits tax item 24)	4038 72	
22. Contributions or gifts paid (From Schedule I)	9180 00	
23. Losses by fire, storm, shipwreck, or other casualty, or theft (Submit schedule)	13468 85	
24. Depreciation (From Schedule J)		
25. Depletion of mines, oil and gas wells, timber, etc. (Submit schedule)	12500 00	
26. Net operating loss deduction (Submit statement)		
27. Amortization of emergency facilities (Submit schedule)		
28. Other deductions authorized by law (From Schedule K)	19157 87	
29. Total deductions in items 16 to 29, inclusive		107709 17
30. Net income for declared value excess-profits tax computation (item 15 minus item 30)		\$ 2562 78
31. Add: Interest on obligations of certain instrumentalities of the United States issued prior to March 1, 1941. (From Schedule M, line 15 (a) (3) (ii))		
32. Less amortizable bond premiums, \$		
33. Total of lines 31 and 32		
34. Less: Declared value excess-profits tax		
35. Net income		
36. Less: Interest on certain obligations of the United States and its instrumentalities issued prior to March 1, 1941. (Enter total of lines 9 (a) and 32)		
37. Adjusted net income		
38. Less: Income subject to excess profits tax (From Form 1121)		
39. Dividends received credit (85 percent of column 2, Schedule E, but not in excess of 85 percent of item 37 minus item 38, above)		
40. Normal-tax net income		\$ 2562 78
TOTAL INCOME AND DECLARED VALUE EXCESS-PROFITS TAXES		
41. Total income tax (line 28 or 50, page 2, whichever is applicable)		
42. Less: Credit for income taxes paid to a foreign country or United States possession allowed a domestic corporation	\$ None	
43. Balance of income tax		
44. Total declared value excess-profits tax (line 8, page 2)		
45. Total income and declared value excess-profits taxes due		\$ None

AFFIDAVIT. (See Instruction E)
We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself depose and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

Subscribed and sworn to before me this 15 day of May, 1944



Michael J. Schubert Notary Public
(Signature of officer administering oath)



James B. Smith President
(President or other principal officer) (State title)
Robert E. Smith Treasurer
(Treasurer, Assistant Treasurer, or Chief Accounting Officer) (State title)

AFFIDAVIT. (See Instruction E)
I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 15 day of May, 1944



Michael J. Schubert Notary Public
(Signature of officer administering oath)

Robert E. Smith
(Signature of person preparing the return)
(Name of firm or employer, if any)

Exhibit O.

29. Adjusted net income (Item 37, page 1, but computed without regard to section 47 (c))	\$		
30. Less: Net operating loss deduction (item 27, page 1)	\$		
31. Total of lines 29 and 30	\$		
32. Less: Excess of net long-term capital gain over short-term capital loss. (From Schedule C)	\$		
33. Adjusted net income (after applying section 362 (b) (1))	\$		
34. Less: Basic surtax credit (excluding capital gain dividends) computed without regard to paragraphs (2) and (3) of section 27 (b). (Submit schedule)	\$		
35. Supplement Q net income	\$		
36. Normal tax (24 percent of line 35)		24%	\$
37. Net income (Item 35, page 1, but computed without regard to section 47 (c))	\$		
38. Add: Net operating loss deduction (item 27, page 1)	\$		
39. Total of lines 37 and 38	\$		
40. Less: Excess of net long-term capital gain over short-term capital loss. (From Schedule C)	\$		
41. Net income (after applying section 362 (b) (2))	\$		
42. Less: Dividends (other than capital gain dividends) paid including consent dividends credit. (Submit schedule)	\$		
43. Supplement Q surtax net income	\$		
44. Surtax (16 percent of line 43)		16%	\$
45. Net long-term capital gain. (From Schedule C)	\$		
46. Less: Net short-term capital loss. (From Schedule C)	\$		
47. Capital gain dividends paid. (Submit schedule)	\$		
48. Excess subject to tax	\$		
49. Tax (25 percent of line 48)		25%	\$
50. Total tax in lines 36, 44, and 49			\$

Schedule A.—COST OF GOODS SOLD. (See Instruction 2)
 (Where inventories are an income-determining factor)

Inventory at beginning of year	\$	
Material or merchandise bought for manufacture or sale	\$	
Salaries and wages	\$	
Other costs per books. (Attach itemized schedule)	\$	
Total	\$	
Less: Inventory at end of year	\$	
Cost of goods sold (enter as item 2, page 1)	\$	

Schedule B.—COST OF OPERATIONS
 (Where inventories are not an income-determining factor)

Salaries and wages	\$
Other costs (to be detailed):	
(a)	
(b)	
(c)	
(d)	
(e)	
Total (enter as item 5, page 1)	\$

Schedule C.—Separate Schedule C (Form 1130) should be secured and used in reporting sales and exchanges of capital assets and filed with and as a part of this return.

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS. (See Instruction 12)

1. Description of Property	2. Date Acquired	3. Gross Sales Price (Contract price)	4. Cost or Other Basis	5. Expense of Sale and Cost of Improvements Subsequent to Acquisition or March 1, 1913	6. Depreciation Allowed (or allowable) Since Acquisition or March 1, 1913 (Furnish details)	7. Gain or Loss (column 3 plus column 6 minus the sum of columns 4 and 5)
		\$	\$	\$	\$	\$
Total net gain (or loss). (Enter as item 12 (b), page 1)						\$

Supplemental information required for Schedule D

State with respect to each item of property reported in Schedule D: (1) how property was acquired (2) whether at time of sale or exchange (a) purchaser owned directly or indirectly more than 50 percent in value of your outstanding stock, (b) where purchaser was a corporation, more than 50 percent in value of its capital stock and 50 percent in value of your capital stock was owned directly or indirectly by or for the same individual or his family, and (c) where purchaser was a corporation, whether more than 50 percent in value of its capital stock was owned directly or indirectly by you. If so, state name and address of purchaser

Exhibit O.

Registration fee		
State Income	5	68
Franchise	232	14
Total. (Enter as item 22, page 1)	18468	85
Total. (Enter as item 23, page 1, subject to 5 percent limitation.) (See Instruction 23)		

Schedule J.—DEPRECIATION. (See Instruction 25)

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Cost or Other Basis (Do not include land or other nondepreciable property)	4. Assets Fully Depreciated in Use at End of Year	5. Depreciation Allowed (or allowable) in Prior Years	6. Remaining Cost or Other Basis To Be Recovered	7. Estimated Life Used in Accounting Depreciation	8. Estimated Remaining Life From Beginning of Year	9. Depreciation Allowed This Year
Leasehold	1913	870383 00		437500 00				12500 00
Total. (Enter as item 25, page 1)								12500 00

Schedule K.—OTHER DEDUCTIONS. (See Instruction 29)

QUESTIONS

1. Date of incorporation May 1913
2. State or country Missouri
3. State collector's office where the corporation's return for the preceding year was filed St. Louis
4. The corporation's books are in care of COMPANY
Located at 722 Chestnut
5. Number of places of business _____
6. Did the corporation during the taxable year have any Government contracts or subcontracts? (Answer "yes" or "no") No. If answer is "yes," state the approximate aggregate gross dollar amount billed during the taxable year under all such contracts and/or subcontracts.
(See Instruction G-(3).) \$ _____
7. Is the corporation a personal holding company within the meaning of section 501 of the Internal Revenue Code? No. (If so, an additional return on Form 1120 H must be filed.)
Is this a consolidated return? No. (If so, procure from the collector of internal revenue for your district Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return.)
8. If this is not a consolidated return: (a) did you own at any time during the taxable year 50 percent or more of the voting stock of another corporation either domestic or foreign? No; or (b) did any corporation, individual, partnership, trust, or association own at any time during the taxable year 50 percent or more of your voting stock?
(If either answer is "yes," attach separate schedule showing: (1) Name and address; (2) percentage of stock owned; (3) date

stock was acquired; and (4) the collector's office in which the income tax return of such corporation, individual, partnership, trust, or association for the last taxable year was filed.)

10. Is this return made on the basis of cash receipts and disbursements? No. If not, describe fully in separate statement ACCURAL
11. Did the corporation at any time during its taxable year have in its employ more than eight individuals? Yes. If answer is "yes," has the corporation in this return taken a deduction for any amount of wages or salaries representing an increase or decrease in rate? (Answer "yes" or "no") No. If answer to second question is "yes," attach statement explaining all such increases or decreases. If any of such increases or decreases required the prior approval of the National War Labor Board or the Commissioner of Internal Revenue as stated in Instruction 16, attach also a copy of the authorization for each of such increases or decreases.
12. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis is used, explain fully in separate statement, giving date inventory was last reconciled with stock.
13. Did the corporation make a return of information on Forms 1090 and 1099 or Forms V-2 and W-3 for the calendar year 1943 (see Instruction G-(1))? Yes
14. Did the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? (Answer "yes" or "no") No. (If answer is "yes," attach statement as required by Instruction K-(3).)

Exhibit O.

Schedule L.—BALANCE SHEETS. (See Instruction L.)

ASSETS	Beginning of Taxable Year			End of Taxable Year		
	Amount	Total		Amount	Total	
1. Cash		\$ 6527 01			\$ 11707 78	
2. Notes and accounts receivable				\$ 13975 89		
Less: Reserve for bad debts		11954 99		11483 39	2492 50	
3. Inventories (itemize in separate schedule)						
4. Investments in governmental obligations:						
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions						
(b) Obligations of the United States:						
(1) Obligations issued on or before September 1, 1917; all postal savings bonds; Treasury notes issued prior to December 1, 1940; and Treasury bills issued prior to March 1, 1941						
(2) United States savings bonds and Treasury bonds issued prior to March 1, 1941						
(3) Treasury notes issued on or after December 1, 1940; and all other obligations of the United States issued on or after March 1, 1941						
(c) Obligations of instrumentalities of the United States:						
(1) Obligations of Federal land banks, joint stock land banks, and Federal intermediate credit banks issued prior to March 1, 1941						
(2) Obligations issued by other instrumentalities of the United States prior to March 1, 1941						
(3) Obligations of all instrumentalities of the United States issued on or after March 1, 1941						
5. Other investments (itemize)						
6. Capital assets:						
(a) Depreciable assets (itemize in separate schedule)	\$ 870467 55			\$ 870467 55		
Less: Reserve for depreciation	437500 00	432967 55		450000 00	420467 55	
(b) Depletable assets						
Less: Reserve for depletion						
(c) Land						
7. Other assets (itemize) Prepaid Insurance	\$ 320 97			\$ 18 97		
		320 97			18 97	
8. TOTAL ASSETS		\$ 451770 52			\$ 454688 58	
		3959 74			3928 02	
9. Accounts payable						
10. Bonds, notes, and mortgages payable:						
(a) With original maturity of less than 1 year						
(b) With original maturity of 1 year or more	\$ 153000 00	153000 00		\$ 153000 00	153000 00	
11. Accrued expenses (itemize) Interest	\$ 15300 00			\$ 24480 00		
Taxes	12451 36	27731 36		245 51	24725 51	
12. Other liabilities (itemize)						
13. Surplus reserves (itemize in separate schedule)						
14. Capital stock:						
(a) Preferred stock						
(b) Common stock	\$ 300000 00	300000 00		\$ 300000 00	300000 00	
15. Paid-in or capital surplus						
16. Earned surplus and undivided profits		32920 58			46968 78	
17. TOTAL LIABILITIES		\$ 451770 52			\$ 454688 58	

Schedule M.—RECONCILIATION OF NET INCOME AND ANALYSIS OF EARNED SURPLUS AND UNDIVIDED PROFITS

1. Total distributions to stockholders charged to earned surplus during the taxable year:		13. Earned surplus and undivided profits at close of preceding taxable year (Schedule L)	\$ 35920 58
(a) Cash	\$	14. Adjusted net income (item 37, page 1)	2562 78
(b) Stock of the corporation		15. Nontaxable and partially exempt income:	
(c) Other property		(a) Interest on:	
* Contributions (excess over 5 percent limits)		(1) Obligations of a State, Territory, or political subdivision thereof, or the District of	

INTERNATIONAL BUILDING CO.
FEDERAL INCOME TAX-1943

Deduction Item 29:

Coal	2441.08
Electric Current	7274.36
Electric Supplies	152.19
Elevator Supplies & Maint.	157.29
Glass	70.97
Hardware	51.63
Incandescent Lamps	775.23
Janitor & Toilet Supplies	2058.74
Miscellaneous Expenses	1217.55
Office Supplies	90.90
Professional Fees	600.00
Telephone	144.23
Water	371.88
Trustee's Fee	2400.00
Insurance	1377.82
	<hr/>
	19157.87

Exhibit O.

TREASURY DEPARTMENT
OFFICE OF THE COLLECTOR OF INTERNAL REVENUE
812 NEW FEDERAL BUILDING
ST. LOUIS (1), MO.

IS-Room 212-JTL.

March 15, 1944

International Building
722 Chestnut St.,
St. Louis, Mo.

Gentlemen:-

Receipt is acknowledged of your application dated Mar. 13, 1944 requesting an extension of 60 days time in which to file your Corporation Income and Excess Profit Tax returns Forms 1120 and 1121 for the year ending December 31, 1943.

An extension of time is hereby granted for a period of 60 days to May 14, 1944 in which to file your completed returns provided a tentative return is filed in this office, St. Louis, Missouri, First Missouri District on or before March 15, 1944 and payment made at that time of at least one-fourth of the total estimated tax shown thereon to be due.

The enclosed statements to accompany tentative income and declared value excess profits tax return, Form 1120 and tentative excess profits tax return Form 1121 must be filled in and attached to the tentative return, but the information called for by the statements need not be shown on the tentative returns.

Interest is payable at the rate of 6% per annum on the difference between the installments shown on the tentative and completed returns from the due date of each installment within the extension period to the date of payment.

This letter or a copy thereof must be attached to both the tentative and completed returns when filed as authority for the extension of time herein granted.

Respectfully,

JOSEPH D. NUNAN, JR.
Commissioner

By

Thomas P. Stanton
Collector ACTING COLLECTOR

Form 1120

Treasury Department
Internal Revenue ServiceUNITED STATES
CORPORATION INCOME AND DECLARED VALUE EXCESS-PROFITS TAX RETURN 1944

For Calendar Year 1944

Tax \$ 3,451.99 or fiscal year beginning 1944, and ending 1945

Pen. \$ PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

Int. \$ 731.00 International Building Co.

Ex.-Profits

Tax \$ 722.99 722 Chestnut Street

Pen. \$

Int. \$ St. Louis, Missouri

TOTAL 4,382.99

Kind of business: Operate office building

No. 272(c) (I. R. O.) 524505

Initials Date JUL 16 1945

1st JUL 16 1945

NORMAL-TAX NET INCOME COMPUTATION

GROSS INCOME		DEDUCTIONS	
1. Gross sales (where inventories are an income-determining factor)		16. Compensation of officers. (From Schedule F)	750.00
2. Less: Cost of goods sold. (From Schedule A)		17. Salaries and wages (not deducted elsewhere)	32,776.17
3. Gross profit from sales		18. Rent	20,000.00
4. Gross receipts (where inventories are not an income-determining factor)		19. Bad debts. (From Schedule G)	
5. Less: Cost of operations. (From Schedule B)			
6. Gross profit where inventories are not an income-determining factor			
7. Interest on loans, notes, mortgages, bonds, bank deposits, etc.			
8. Interest on corporation bonds, etc.			
9. (a) Interest on United States savings bonds and Treasury bonds owned in excess of the principal amount of \$4,000 issued prior to March 1, 1941. (From Schedule H, line 6 (a) (2) (iii))			
(b) Interest on Treasury securities issued on or after December 1, 1940, and obligations issued on or after March 1, 1941, by the United States or any agency or instrumentality thereof. (Submit schedule)			
10. Rents	118,408.32		
11. Royalties			
12. (a) Excess of net short-term capital gain over net long-term capital loss. (From Schedule C)			
(b) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule D)			
13. Dividends. (From Schedule E)			
14. Other income. (State nature)	350.76		
15. Total income in items 3, and 6 to 14, inclusive	118,759.08		

File Code 181

Serial No. 9201688

District Missouri

(Clerk's stamp)

Cash Check M. O.

First Payment

R. A. B. ATT'D. 10-11-45

45-RETURN

916

Page 2 **DECLARED VALUE EXCESS-PROFITS TAX COMPUTATION.** (See Computation Instructions)

Line No.	Column 1	Col. 2 Rate	Column 3 Amount of Tax
1. Net income for declared value excess-profits tax computation (Item 31, page 1)			
2. Value of capital stock as declared in your capital stock tax return for the year ended, June 30, 1944 (or for the year ended June 30, 1945, if your income tax fiscal year began in 1944 and ended on or after July 31, 1945)			
3. 10 percent of line 2			
4. Dividends received credit (85 percent of column 2, Schedule E, but not in excess of 85 percent of item 38 minus item 39, page 1)			
5. Balance subject to declared value excess-profits tax (line 1 minus total of lines 3 and 4)			
6. Amount taxable at 6.6 percent (5 percent of line 2, but not more than line 5); and tax		6.6%	
7. Balance taxable at 13.2 percent (line 5 minus line 6, column 1); and tax		13.2%	
8. Total declared value excess-profits tax (total of line 6, column 3, and line 7, column 3)			

INCOME TAX COMPUTATION. (See Computation Instructions)

NORMAL TAX COMPUTATION DOMESTIC CORPORATIONS WITH NORMAL-TAX NET INCOMES NOT OVER \$25,000			
9. Normal-tax net income (Item 41, page 1)			
10. Portion of line 9 (not in excess of \$5,000); and tax at 15 percent		15%	
11. Portion of line 9 (in excess of \$5,000 and not in excess of \$20,000); and tax at 17 percent		17%	
12. Portion of line 9 (in excess of \$20,000 and not in excess of \$25,000); and tax at 19 percent		19%	
13. Portion of line 9 (in excess of \$25,000); and tax at 31 percent		31%	
14. Total normal tax (total tax in column 3 of lines 10, 11, 12, and 13)			

DOMESTIC CORPORATIONS WITH NORMAL-TAX NET INCOMES OF OVER \$25,000 AND FOREIGN CORPORATIONS ENGAGED IN BUSINESS WITHIN THE UNITED STATES IRRESPECTIVE OF AMOUNT OF NORMAL-TAX NET INCOME			
15. Normal-tax net income (Item 41, page 1)			
16. Normal tax (24 percent of line 15)		24%	

SURTAX COMPUTATION			
17. Net income (Item 30, page 1)			
18. Less: Adjusted excess profits net income (Item 30, page 1)			
19. Dividends received credit (85 percent of column 2, Schedule E, but not in excess of 85 percent of line 17 minus 18 (excluding from the computation certain dividends received on preferred stock of a public utility))			
20. Dividends paid on certain preferred stock if taxpayer is a public utility			
21. Surtax net income			

CORPORATIONS WITH SURTAX NET INCOMES NOT OVER \$25,000			
22. Portion of line 21 (not in excess of \$25,000); and tax at 10 percent (or 12 percent in the case of a consolidated return)		10%	
23. Portion of line 21 (in excess of \$25,000 and not in excess of \$50,000); and tax at 22 percent (or 24 percent in the case of a consolidated return)		22%	
24. Total surtax in column 3 of lines 22 and 23			

CORPORATIONS WITH SURTAX NET INCOMES OF OVER \$25,000			
25. Surtax net income (line 21 above)			
26. Surtax (16 percent of line 25) (or 18 percent in the case of a consolidated return)		16%	
27. Total normal tax and surtax (line 14 or 16, plus line 24 or 26, whichever is applicable)			
28. Total tax (line 27, or line 31 Schedule C)			

TAX COMPUTATION FOR REGULATED INVESTMENT COMPANIES			
29. Adjusted net income (Item 30, page 1, but computed without regard to section 47 (c))			
30. Less: Net capital loss deduction (Item 27, page 1)			
31. Total net income (line 29 and 30)			
32. Less: Federal income tax term capital gain over net short-term capital loss. (From Schedule C)			

Schedule L—BALANCE SHEET (For Corporation L)

Assets	Beginning of Year		End of Taxable Year	
	Amount	Total	Amount	Total
1. Cash		\$11,707 76		\$12,936 66
2. Notes and accounts receivable	\$13,975 69		\$4,876 80	
Less: Reserve for bad debts	11,483 39	2,492 30	1,625 50	3,251 10
3. Inventories (itemize in separate schedule)				
4. Investments in governmental obligations:				
(a) Obligations of the United States, or political subdivisions thereof, or the District of Columbia, or United States possessions				
(b) Obligations issued on or before September 1, 1937, all postal savings bonds, any series issued prior to December 1, 1937, and Treasury bonds issued prior to March 1, 1938				
(c) United States savings bonds and Treasury bonds issued prior to March 1, 1938				
(d) Treasury bonds issued on or after December 1, 1937, and all other obligations of the United States issued on or after March 1, 1938				
(e) Obligations of Federal land banks, joint stock land banks, and Federal intermediate credit banks issued prior to March 1, 1938				
(f) Obligations issued by other institutions of the United States prior to March 1, 1938				
(g) Obligations of all institutions of the United States issued on or after March 1, 1938				
5. Other investments (itemize)				
6. Capital assets:				
(a) Depreciable assets (itemize in separate schedule)	\$870,467 55		\$870,467 55	
Less: Reserve for depreciation	450,000 00	420,467 55	462,500 00	407,967 55
(b) Depletable assets				
Less: Reserve for depletion				
(c) Land				
7. Other assets (itemize) Prepaid Expenses	\$18 97		\$7,624 96	
Advances & Deposits		18 97	3,406 67	11,031 63
8. TOTAL ASSETS		\$434,686 58		\$435,186 94
LIABILITIES				
9. Accounts payable Purchases		\$3,928 02		\$839 38
10. Bonds, notes, and mortgages payable: a/o Pay-others				3,600 00
(a) With original maturity of less than 1 year				
(b) With original maturity of 1 year or more		153,000 00		132,061 15
11. Accrued expenses (itemize) Interest	\$24,480 00			
Taxes	245 31	24,725 31	729 36	729 36
12. Other liabilities (itemize) a/o Payable—Insurance, Etc.			1,519 12	1,519 12
13. Surplus reserves (itemize in separate schedule)				
14. Capital stock:				
(a) Preferred stock				
(b) Common stock	300,000 00	300,000 00		300,000 00
15. Paid-in or capital surplus				
16. Earned surplus and undivided profits Deficit		46,966 75		4,362 87
17. TOTAL LIABILITIES		\$434,686 58		\$435,186 94

Schedule M—RECONCILIATION OF NET INCOME AND ANALYSIS OF EARNED SURPLUS AND UNDIVIDED PROFITS

1. Total distributions to stockholders charged to earnings during the taxable year:		13. Earned surplus and undivided profits at close of preceding taxable year (Schedule L)	\$46,966 75
2. Total of the corporation:		14. Adjusted net income (item 38, page 1)	4,776 24
3. Total property:		15. Nontaxable and partially exempt income:	
		(a) Interest on:	
		(1) Obligation of a State Territory	

-Exhibit P.

INTERNATIONAL BUILDING CO. -- 1944.

OTHER DEDUCTIONS:

Coal	\$ 2,489.71
Electric Current	7,717.97
Electric Supplies	76.43
Elevator Maintenance	1,344.59
General Repairs	1,305.80
Hardware	143.22
Insurance	1,733.75
Janitor Supplies	1,071.47
Millwork & Alterations	797.67
Miscellaneous	2,004.35
Office Supplies	64.86
Paints & Brushes	1,812.41
Professional fees	7,072.50
Telephone	169.19
Water	476.58
Incandescent lamps	131.72
Glass	181.97
Amortization of Mortgage expenses	216.26
Trustee's fees	<u>5,900.00</u>

Total

\$ 34,730.45

OTHER INCOME:

Sale of waste paper	\$ 263.55
Sale of Ice	77.86
Income from lobby phones	<u>9.35</u>

Total

\$ 350.76

TAXES:

Real Estate - property tax	\$12,592.01
Social Security & Unemployment	731.06
Franchise Tax	217.58
Corporation Registration	10.00
Personal Property	<u>67.85</u>

Total

\$ 13,618.50

1. Cash			14. Adjusted net income (item 37, page 1)	2562	78
(a) Stock of the corporation			15. Nontaxable and partially exempt income:		
(c) Other property			(a) Interest on:		
2. Contributions (excess over 5 percent limitation)			(1) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions		
3. Federal income and excess-profits taxes			(2) Obligations of the United States:		
4. Income taxes claimed as a credit in whole or in part in item 42, page 1			(i) Obligations issued on or before September 1, 1917; all postal savings bonds; Treasury notes issued prior to December 1, 1940; and Treasury bills issued prior to March 1, 1941		
5. Federal taxes paid on tax-free covenant bonds			(ii) United States savings bonds and Treasury bonds owned in the principal amount of \$5,000 or less, issued prior to March 1, 1941		
6. Excess of capital losses over capital gains			(iii) United States savings bonds and Treasury bonds owned in excess of the principal amount of \$5,000 issued prior to March 1, 1941		
7. Additions to surplus reserves (list separately):			(3) Obligations of instrumentalities of the United States:		
(a) Reserve for Bad Debts	11483	39	(i) Obligations of Federal land banks, joint stock land banks, and Federal intermediate credit banks issued prior to March 1, 1941		
(b)			(ii) Obligations issued by other instrumentalities of the United States prior to March 1, 1941		
8. Other unallowable deductions:			(b) Other nontaxable income (itemize):		
(a)			(1)		
(b)			(2)		
9. Adjustments not recorded on books (itemize):			16. Charges against surplus reserves (itemize):		
(a)			17. Adjustments not recorded on books (itemize):		
(b)			18. Sundry credits to earned surplus (itemize):		
10. Sundry debits to earned surplus (itemize):			19. Total of lines 15 to 18	35483	36
(a)					
(b)					
11. Earned surplus and undivided profits at close of the taxable year (Schedule L)	46966	75			
12. Total of lines 1 to 11	35483	36			

EXCESS PROFITS TAX. (See instructions for Form 1121)

- (a) Is an excess profits tax return on Form 1121 being filed for the taxable period covered by this return? **No**
- (b) If a personal service corporation (other than a member of an affiliated group of corporations filing a consolidated return) signifies below its desire not to be subject to the excess profits tax, it shall be exempt from such tax and the provisions of Supplement 8, Chapter 1, shall apply to the shareholders in such corporation who were such shareholders on the last day of the taxable year of the corporation. (Attach Form 1121PS)
- (c) If corporation claims exemption under section 727 of the Internal Revenue Code, state basis of claim
- (d) If an excess profits tax return is not being filed for the reason that it is claimed that the excess profits net income computed under the invested capital method is not greater than \$5,000, the following Schedule N should be filed in. The completion of Schedule N does not constitute the filing of an excess profits tax return.

Schedule N.—EXCESS PROFITS NET INCOME COMPUTATION

1. Normal-tax net income computed without credit for income subject to excess profits tax (item 40 plus item 38, page 1)	2562	78	6. Dividends received credit adjustment (item 13, page 1, excluding the sum of (a) dividends received (actual or constructive) from foreign personal holding companies, and (b) dividends received on stock held primarily for sale to customers by a dealer in securities; minus item 20, page 1)		
2. Net short-term capital gain (do not enter net short-term capital loss)	4590	00	7. Net gain from sale or exchange of capital assets (item 12 (a), page 1)		
3. 50 percent of interest on borrowed capital			8. Income from retirement or discharge of bonds, etc.		
4. Adjustment to net operating loss deduction under section 711 (a) (2) (L)			9. Refunds and interest on Agricultural Adjustment Act taxes		
5. Total of lines 1 to 4	2027	22	10. Recoveries of bad debts		
			11. Total of lines 6 to 10		
12. Excess profits net income (for purpose of determining necessity for filing return) (line 5 minus line 11)	2027	22			

Form 1120.
Treasury Department
Internal Revenue Service

CORPORATION INCOME

100709
UNITED STATES

DECLARED VALUE EXCESS-PROFITS TAX RETURN

OFFICE AUDIT
1945

For calendar year 1945

or fiscal year beginning

1945, and ending

1946

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

International Building Co.

722 Chestnut

St. Louis 1

(City or town, postal zone number)

Kind of business: Office Building

524506

Mo.

(State)

43

MAR 15 1946

Serial

No.

4100575

District

1 Missouri

(Cashier's stamp)

Cash

Check

M. O.

First Payment

Initials

Date

Serial number

182

Number of places

of business

one

Listed and
unlisted sales

GROSS INCOME

JUL 16 1945

Less: Returns and
allowances

Less: Cost of sales (where inventories are
an income-determining factor)

Less: Cost of operations (From Schedule A)

2. Gross profit from sales

4. Gross receipts (where inventories are not an income-determining factor)

5. Less: Cost of operations (From Schedule B)

6. Gross profit where inventories are not an income-determining factor

7. Interest on loans, notes, mortgages, bonds, bank deposits, etc.

8. Interest on corporation bonds, etc.

9. (a) Interest on United States savings bonds and Treasury bonds owned in excess
of the principal amount of \$5,000 issued prior to March 1, 1941. (From Schedule
B, line 10 (a) (b) (2))

(b) Interest on Treasury notes issued on or after December 1, 1940, and obligations
issued on or after March 1, 1941, by the United States or any agency or instru-
mentality thereof. (Submitt schedule)

10. Rents

11. Royalties

12. (a) Excess of net short-term capital gain over net long-term capital loss. (From Schedule C)

(b) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule D)

13. Dividends (From Schedule E)

14. Other income (State nature)

15. Total income in items 3, and 6 to 14, inclusive

DEDUCTIONS

16. Compensation of officers (From Schedule F)

17. Salaries and wages (not deducted elsewhere)

18. Rent

19. Repairs

20. Bad debts (From Schedule G)

2,700	00
32,414	93
20,000	00
5,748	74
6,799	72
13,610	41

135,136 83

CLAIM REJECTED

3373758

Less: Amortizable
Bond Premium

1

MAR 14 1946

DECLARED VALUE EXCESS-PROFITS TAX COMPUTATION

Computation Instructions

Line No.

1. Net income for declared value excess-profits tax computation (Item 31, page 1) 7,168 87
2. Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1948 (or for year ended June 30, 1947, if your income tax fiscal year began in 1948 and ended on or after June 30, 1948) \$ 150,000.
3. 10 percent of line 2 \$
4. Dividends received credit (85 percent of column 2, Schedule E, but not in excess of 85 percent of item 38 minus item 39, page 1) \$
5. Balance subject to declared value excess-profits tax (line 1 minus total of lines 3 and 4) \$ none
6. Amount taxable at 6.6 percent (5 percent of line 2, but not more than line 5); and tax \$
7. Balance taxable at 13.2 percent (line 5 minus line 6, column 1); and tax \$ none
8. Total declared value excess-profits tax (total of line 6, column 3, and line 7, column 3) \$

Column 1	Col. 2 Rate	Column 3 Amount of Tax
7,168 87		
15,000 00		
none	6.6%	
	13.2%	none

INCOME TAX COMPUTATION. (See Computation Instructions)

NORMAL TAX COMPUTATION
DOMESTIC CORPORATIONS WITH NORMAL-TAX NET INCOMES NOT OVER \$25,000

9. Normal-tax net income (Item 41, page 1) \$ 7,168 87
10. Portion of line 9 (not in excess of \$5,000); and tax at 15 percent \$ 5,000 00 15%
11. Portion of line 9 (in excess of \$5,000 and not in excess of \$20,000); and tax at 17 percent \$ 2,168 87 17%
12. Portion of line 9 (in excess of \$20,000 and not in excess of \$25,000); and tax at 19 percent \$ 1,118 71 19%
13. Portion of line 9 (in excess of \$25,000); and tax at 31 percent \$ 368 71 31%
14. Total normal tax (total tax in column 3 of lines 10, 11, 12, and 13) \$ 1,118 71

7,168 87		
5,000 00	15%	750 00
2,168 87	17%	368 71
	19%	
	31%	
		1,118 71

DOMESTIC CORPORATIONS WITH NORMAL-TAX NET INCOMES OF OVER \$25,000 AND FOREIGN CORPORATIONS ENGAGED IN BUSINESS WITHIN THE UNITED STATES IRRESPECTIVE OF AMOUNT OF NORMAL-TAX NET INCOME

15. Normal-tax net income (Item 41, page 1) \$
16. Normal tax (24 percent of line 15) \$

	24%	
--	-----	--

SURTAX COMPUTATION

17. Net income (Item 34, page 1) \$ 7,168 87
18. Less: Adjusted excess profits net income (Item 39, page 1) \$
19. Dividends paid: A credit (85 percent of column 2, Schedule E, but not in excess of 85 percent of line 17 minus 18 (excluding from the computation dividends received on certain preferred stock of a public utility)) \$
20. Dividends paid on certain preferred stock if taxpayer is a public utility \$
21. Surtax net income \$

7,168 87		

CORPORATIONS WITH SURTAX NET INCOMES NOT OVER \$25,000

22. Portion of line 21 (not in excess of \$25,000); and tax at 10 percent (or 12 percent in the case of a consolidated return) \$ 7,168 87 10%
23. Portion of line 21 (in excess of \$25,000 and not in excess of \$50,000); and tax at 22 percent (or 24 percent in the case of a consolidated return) \$ 716 89 22%
24. Total surtax in column 3 of lines 22 and 23 \$ 716 89

7,168 87	10%	716 89
	22%	
		716 89

CORPORATIONS WITH SURTAX NET INCOMES OF OVER \$50,000

25. Surtax net income (line 21 above) \$
26. Surtax (16 percent of line 25) (or 18 percent in the case of a consolidated return) \$
27. Total normal tax and surtax (line 14 or 16, plus line 24 or 26, whichever is applicable) \$
28. Total tax (line 27, or line 31 Schedule C) \$ 1,835 60

	16%	
		1,835 60

TAX COMPUTATION FOR REGULATED INVESTMENT COMPANIES

29. Adjusted net income (Item 34, page 1, but computed without regard to section 47 (a)) \$
30. Reduction (Item 37, page 1) \$

20. Bad debts. (From Schedule G)			
21. Interest	9,160	20	
22. Taxes. (From Schedule H) (Deduct declared value excess-profits tax (item 42))	13,618	50	
23. Contributions or gifts paid. (From Schedule I)			
24. Losses by fire, storm, shipwreck, or other casualty, or theft. (Submit schedule)			
25. Depreciation. (From Schedule J)	12,500	00	
26. Depletion of mines, oil and gas wells, timber, etc. (Submit schedule)			
27. Net operating loss deduction. (Submit statement)			
28. Amortization of emergency facilities. (Submit schedule)			
29. Other deductions authorized by law. (From Schedule K) <u>Schedule Attached</u>	34,730	45	
30. Total deductions in items 16 to 29, inclusive			123,535 32
31. Net income for declared value excess-profits tax computation (item 15 minus item 30) <u>Loss</u>			4,776 34
32. Add: Interest on obligations of certain instrumentalities of the United States issued prior to March 1, 1941. (From Schedule M, line 15 (a) (3) (ii))			
33. Excess of net long-term capital gain over net short-term capital loss. (From Schedule C)			
34. Total of lines 31, 32, and 33			
35. Less: Declared value excess-profits tax			
36. Net income			
37. Less: Interest on certain obligations of the United States and its instrumentalities issued prior to March 1, 1941. (Enter total of lines 9 (a) and 12)			
38. Adjusted net income			4,776 34
39. Less: Adjusted excess profits net income from Form 1121. (See instruction on page 8)			
40. Dividends received credit (8% percent of column 2, Schedule E, but not in excess of 8% percent of item 38 minus item 39, above)			
41. Normal-tax net income			4,776 34
TOTAL INCOME AND DECLARED VALUE EXCESS-PROFITS TAXES.			
42. Total income tax (line 28 or 50, page 2, whichever is applicable)			
43. Less: Credit for income taxes paid to a foreign country or United States possession allowed a domestic corporation			
44. Balance of income tax			
45. Total declared value excess-profits tax (line 8, page 2)			
46. Total income and declared value excess-profits taxes due			None

AFFIDAVIT. (See instruction E)
 We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself depose and say that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

Subscribed and sworn to before me this 25th day of January, 1945

James E. Hume Robert L. Hume
 President of corporation (Make this) James E. Hume
 Treasurer of corporation (Make this) Robert L. Hume

AFFIDAVIT. (See instruction E)
 I do swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person for whom this return has been prepared, and I/we have any knowledge.

Subscribed and sworn to before me this 25th day of March, 1945

James E. Hume Robert L. Hume
 (Signature of person preparing the return) James E. Hume
 (Signature of person preparing the return) Robert L. Hume

1. Dividends received from 5 percent limited-			
2. Federal income and excess-profits taxes			
3. Income taxes claimed as a credit in whole or in part in item 43, page 1			
4. Federal taxes paid on tax-free covenant bonds			
5. Excess of capital losses over capital gains			
6. Additions to surplus reserves (list separately):			
(a)			
(b)			
7. Other allowable deductions:			
(a)			
(b)			
8. Adjustments not recorded on books (itemize):			
(a)			
(b)			
9. Sundry debits to earned surplus (itemize):			
(a) <u>a/c Pay Adjustment</u>		49	08
(b)			
10. Earned surplus and undivided profits at close of the taxable year (Schedule L)		4712	97
11. Total of lines 1 to 10		4712	99
15. Nontaxable and partially exempt income:			
(a) Interest on:			
(1) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions			
(2) Obligations of the United States:			
(i) Obligations issued on or before September 1, 1917; all postal savings bonds; Treasury notes issued prior to December 1, 1940; and Treasury bills issued prior to March 1, 1941			
(ii) United States savings bonds and Treasury bonds owned in the principal amount of \$5,000 or less, issued prior to March 1, 1941			
(iii) United States savings bonds and Treasury bonds owned in excess of the principal amount of \$5,000 issued prior to March 1, 1941			
(3) Obligations of instrumentalities of the United States:			
(i) Obligations of Federal land banks, joint stock land banks, and Federal intermediate credit banks issued prior to March 1, 1941			
(ii) Obligations issued by other instrumentalities of the United States prior to March 1, 1941			
(b) Other nontaxable income (itemize):			
(1)			
(2)			
16. Charges against surplus reserves (itemize):			
17. Adjustments not recorded on books (itemize):			
18. Sundry credits to earned surplus (itemize):			
<u>Forgiveness of indebtedness</u>			
19. Total of lines 13 to 18			
		47,030	00
		4712	99

EXCESS-PROFITS TAX. (See Instructions for Form 1121)

- (a) Is an excess profits tax return on Form 1121 being filed for the taxable period covered by this return?
- (b) If a personal service corporation (other than a member of an affiliated group of corporations filing a consolidated return) signifies below its desire not to be subject to the excess profits tax, it shall be exempt from such tax and the provisions of Supplement S, Chapter 1, shall apply to the shareholders in such corporation who were such shareholders on the last day of the taxable year of the corporation. (Attach Form 1121PS)
- (c) If corporation claims exemption under section 727 of the Internal Revenue Code, state basis of claim.
- (d) If an excess profits tax return is not being filed for the reason that it is claimed that the excess profits net income computed under the invested capital method is not greater than \$10,000, the following Schedule N should be filed in. The completion of Schedule N does not constitute the filing of an excess profits tax return.

Schedule N.—EXCESS PROFITS NET INCOME COMPUTATION

1. Normal-tax net income (computed without credit for income subject to excess profits tax and dividends-received credit) (item 28, page 1)	4,776	24
2. Net short-term capital gain (do not enter net short-term capital loss)		
3. 50 percent of interest on borrowed capital	4,580	10
4. Adjustment to net operating loss deduction under section 711 (a) (2) (L)		
5. Total of lines 1 to 4	146	14
6. Dividends received credit adjustment (item 23, page 1, including the sum of (a) dividends received federal or constructive from foreign personal holding companies, and (b) dividends received on stock held primarily for sale to customers by a dealer in securities)		
7. Net gain from sale or exchange of capital assets (item 12 (a), plus item 23, page 1)		
8. Income from retirement or discharge of bonds, etc.		
9. Refunds and interest on Agricultural Adjustment Act taxes		
10. Recoveries of bad debts		
11. Total of lines 6 to 10		
12. Excess profits net income (for purpose of determining liability for filing return) (line 5 minus line 11)		196 14

Exhibit P.

For Calendar Year 1945

^aTotals

Total of columns 2, 3, and 4. (Enter as item 13, page 1)

Report dividends received from corporations organized under the China Trade Act, 1922, and corporations entitled to the benefits of section 235 of the Internal Revenue Code, which dividends should be entered in column 4.

Dividends on share accounts in Federal savings and loan associations in case of share accounts issued prior to March 28, 1942, should not be listed, but the amount should be included in items 23 and 27, page 1, dividends on share accounts issued on or after March 28, 1942, should be reported in column 4.

Schedule F.—COMPENSATION OF OFFICERS

1. Name and Address of Officer	2. Official Title	3. Time Devoted in 1964	Percentage of Corporation's Stock Owned	4. Amount of Compensation
Schedule attached	THIS RETURN HAS BEEN PREPARED			
	FROM INFORMATION SUBMITTED BY			
	TAXPAYER. SAID INFORMATION HAS			
	NOT BEEN AUDITED OR VERIFIED BY			
	KESSLER AND/OR CHERVITZ			
Total compensation of officers. (Enter as item 16, page 1)				

Note.—Schedule F-1 (IN DUPLICATE) also must be filed with this return if compensation in excess of \$75,000 was paid to any officer or employee.

Schedule C—BAD DEBTS. (See Instruction 20) (See notes 1 and 2)

1. Taxable Year	2. Net Income Reported	3. Balance on Account	4. Bad Debts of Corporation If No Reserve Is Carried on Books. - (See note 2)	If Corporation Carries a Reserve—	
				5. Gross Amount Added to Reserve	6. Amount Charge Against Reserve
1941					
1942					
1943					
1944					
1945					

1. Check whether deduction claimed represents debts which have become worthless ☐ or is an addition to a reserve ☒

2. Not including securities which are capital assets and which became worthless within the taxable year. Such securities which became worthless within the year should be reported in Schedule C.

Schedule H.—TAXES. (See instruction 22)

Nature	Amount
	\$
Total.	\$

(Enter as item 22, page 1)

Schedule 1.—CONTRIBUTIONS OR GIFTS PAID. (See instruction 23)

[illegible]

Schedule L.—BALANCE SHEETS. (See instruction L)

ASSETS	Beginning of Taxable Year				End of Taxable Year			
	Amount		Total		Amount		Total	
1. Cash			\$ 12,936	66			\$ 22,817	55
2. Notes and accounts receivable	\$ 4,876	60			\$ 4,477	66		
Less: Reserve for bad debts	1,625	50	3,251	10	1,625	50	2,852	16
3. Inventories (itemize in separate schedule)								
4. Investments in governmental obligations:								
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions								
(b) Obligations of the United States:								
(1) Obligations issued on or before September 1, 1917; all postal savings bonds; Treasury notes issued prior to December 1, 1940; and Treasury bills issued prior to March 1, 1941								
(2) United States savings bonds and Treasury bonds issued prior to March 1, 1941								
(3) Treasury notes issued on or after December 1, 1940; and all other obligations of the United States issued on or after March 1, 1941								
(c) Obligations of instrumentalities of the United States:								
(1) Obligations of Federal land banks, joint stock land banks, and Federal intermediate credit banks issued prior to March 1, 1941								
(2) Obligations issued by other instrumentalities of the United States prior to March 1, 1941								
(3) Obligations of all instrumentalities of the United States issued on or after March 1, 1941								
5. Other investments (itemize)								
6. Capital assets:								
(a) Depreciable assets (itemize in separate schedule)	\$ 870,467	55			\$ 870,666	20		
Less: Reserve for depreciation	462,500	00	407,967	55	475,012	26	395,653	94
(b) Depletable assets								
Less: Reserve for depletion								
(c) Land								
7. Other assets (itemize) <u>Deferred charges</u>	\$ 7,624	96			\$ 12,704	49		
<u>Advances & deposits</u>	3,406	67	11,031	63	2,640	00	15,344	49
8. TOTAL ASSETS			\$ 35,186	94			\$ 436,668	14
LIABILITIES								
9. Accounts payable			\$ 4,439	38			\$ 1,225	47
10. Bonds, notes, and mortgages payable:								
(a) With original maturity of less than 1 year								
(b) With original maturity of 1 year or more			132,861	15			124,063	74
11. Accrued expenses (itemize) <u>Taxes</u>	\$ 722	38			\$ 2,922	60		
<u>Other</u>	1,519	12	2,248	48	165	94	3,088	54
12. Other liabilities (itemize)								
13. Surplus reserves (itemize in separate schedule)								
14. Capital stock: Number of shares at end of year:								
(a) Preferred stock								
(b) Common stock			300,000	00			300,000	00
15. Paid-in or capital surplus								
16. Earned surplus and undivided profits			4,362	07			8,510	30
17. TOTAL LIABILITIES			\$ 35,186	94			\$ 436,668	14

Schedule M.—RECONCILIATION OF NET INCOME AND ANALYSIS OF EARNED SURPLUS AND UNDIVIDED PROFITS

1. Total distributions to stockholders charged to earned surplus during the taxable year:			13. Earned surplus and undivided profits at close of preceding taxable year (Schedule L)	\$ 4,362	07
(a) Cash			14. Adjusted net income (item 38, page 1)	7,168	67
(b) Stock of the corporation			15. Nontaxable and partially exempt income:		
			(a) Foreign income		

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20. Taxes (From Schedule H) (Deduct declared value excess-profits tax from item 15)
 21. Contributions or gifts paid (From Schedule I)
 22. Losses by fire, storm, shipwreck, or other casualty, or theft (Submit schedule)
 23. Depreciation (From Schedule J)
 24. Depletion of mines, oil and gas wells, timber, etc. (Submit schedule)
 25. Net operating loss deduction (Submit statement)
 26. Amortization of emergency facilities (Submit schedule)
 27. (a) Advertising
 (b) Amounts contributed under a pension, annuity, stock bonus, or profit-sharing plan, etc.
 (c) Other deductions authorized by law (From Schedule K)
 28. Total deductions in items 20 to 27, inclusive.
 29. Net income for declared value excess-profits tax computation (item 15 minus item 28)
 30. Add: Interest on obligations of certain instrumentalities of the United States issued prior to March 1, 1941. (From Schedule M, line 15 (a) (3) (ii))
 31. Less: amortizable bond premiums
 32. Net income of net long-term capital gain over net short-term capital loss (From Schedule C)
 33. Total of lines 29, 30, and 31
 34. Less: Declared value excess-profits tax
 35. Net income
 36. Less: Interest on certain obligations of the United States and its instrumentalities issued prior to March 1, 1941. (Enter total of lines 30 (a) and 32)
 37. Adjusted net income
 38. Less: Adjusted excess profits net income from Form 1121. (See instruction on page 8)
 Dividends received credit (85 percent of column 2, Schedule E, but not in excess of 85 percent of line 38, above)
 39. Normal tax net income
 TOTAL INCOME AND DECLARED VALUE EXCESS-PROFITS TAXES
 40. Total income tax (line 38 or 39, page 2, whichever is applicable)
 41. Less: Credit for income taxes paid to a foreign country or United States possession allowed a domestic corporation
 42. Balance of income tax
 43. Total declared value excess-profit tax (line 8, page 2)
 44. Total income and declared value excess-profits taxes due

6,799	72
13,610	41
12,512	26
7,339	02
43	66
27,603	15
127,967	96
7,168	57
7,168	57
7,168	57
1,835	80
1,835	80
1,835	80

AFFIDAVIT. (See instruction E)
 We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself, depose and say that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return made in good faith for the year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

Subscribed and sworn to before me this 21 day of February, 1946
Arthur H. Hallen Notary Public
 (Signature of officer administering oath)
 (Name)
 CORPORATE SEAL
Alvin K. Kinsler
 (Signature of person preparing the return)
 (Name of person preparing the return)
 (Name of firm or employee, if any)

AFFIDAVIT. (See instruction E)
 I, an officer (or officer) that has prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person for whom this return has been prepared of which I am lawfully aware.
 Subscribed and sworn to before me this 25th day of February, 1946
Arthur H. Hallen Notary Public
 (Signature of officer administering oath)
 (Name)
 19-41104-5
Alvin K. Kinsler
 (Signature of person preparing the return)
 (Name of firm or employee, if any)

INTERNATIONAL BUILDING COMPANY
Income Tax Schedules - 1945

OTHER INCOME:

Sales of waste paper	\$ 235.21
Profit from sales of ice	92.03
Income from lobby telephones	<u>88.03</u>
	\$ 415.27

SCHEDULE F - Compensation of officers

Henri Chouteau, President	<u>2,700.00</u>
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SCHEDULE H - Taxes

		<u>Federal</u>	<u>State</u>
Corporation Franchise Tax	\$ 217.59		
Corporate Registration Fee	10.00		
Capital Stock Tax	+ 187.50		
Personal Property Tax	8.18		
Real Estate Tax	12,606.38		
Social Security Taxes	<u>322.14</u>	13,351.79	13,351.79
Federal Income Tax			1,835.60
Missouri Income Tax		<u>258.62</u>	
		<u>\$13,610.41</u>	<u>\$15,187.39</u>

SCHEDULE J - Depreciation

Property	Acquired	Est. Life	Cost	Depreciation Allowed	Depreciation This Year
Building on leased ground	1915		870,383.00	462,500.00	12,500.00 X
Office equipment		15 years	84.55	---	5.84
	1945	15 years	<u>198.65</u>	---	<u>6.62</u>
			<u>870,666.20</u>	<u>462,500.00</u>	<u>12,512.26</u>

NET OPERATING LOSS DEDUCTION

Loss for 1943	2,562.78
Loss for 1944	<u>4,776.24</u>
	<u>7,339.02</u>

Int. 3-15-46 to 7-16-48

Form 1121
Treasury Department
Internal Revenue Service

UNITED STATES
CORPORATION EXCESS PROFITS TAX RETURN
For Calendar Year 1945

Page 1
1945

INT. REV. AGENT IN CHARGE
ST. LOUIS DIVISION

or fiscal year beginning _____, 1945, and ending _____, 1946

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

International Building Company

722 Chestnut Street

St. Louis 1,

No.

(City or town, postal zone number)

(State)

Business group serial number entered on page 1, Form 1120

EXCESS PROFITS TAX COMPUTATION

Tax \$
Pen. \$
Inv. \$
Ex. - Profits \$
Tax \$ 1,110.00
Pen. \$
Int. \$ 253.85
TOTAL 2064.91

File Code 181
Serial No. 3400895

District 1-7120
(Cashier's stamp)

Cash Check M. O.
First payment

		COLUMN 1 INCOME CREDIT METHOD	COLUMN 2 INVESTED CAPITAL CREDIT METHOD
1.	Excess profits net income (line 18, Schedule A)		\$ 10,068 27
2.	Specific exemption		\$ 10,000 00
3.	Excess profits credit based on income (line 46, Schedule B)		XXXXXX XX
4.	Excess profits credit based on invested capital (line 40, Schedule C)		24,000 00
5.	Unused excess profits credit adjustment (attach schedule)	not needed, therefore, not computed	
6.	Total of items 2 to 5	\$	\$ 34,000 00
7.	Difference between item 1 and item 6	\$	\$
8.	Adjusted excess profits net income (item 7, column 1, or item 7, column 2, whichever is applicable)		\$ None
9.	95 percent of item 8		
10.	Net income (item 36, page 1, Form 1120)		
11.	Less: (a) Dividends received credit (85 percent of total of column 2, Schedule E, Form 1120, but not in excess of 85 percent of item 10 above (excluding from the computation dividends received on certain preferred stock of a public utility))		
	(b) Credit for dividends paid on certain preferred stocks if taxpayer is a public utility (20 percent of line 20, page 2, Form 1120)		
12.	Surplus net income (computed without regard to the credit provided in section 26 (e) (sum of lines 18 and 21, page 2, Form 1120) and without regard to 80 percent of the credit provided in section 26 (h))		
13.	80 percent of item 12		
14.	Income tax under Chapter 1 (other than section 102) for the taxable year (item 42, page 1, Form 1120)		
15.	Excess of item 13 over item 14		
16.	Item 9, or item 15, whichever is lesser		
17.	Amount deferred by reason of the application of section 710 (a) (5) (relating to abatement of tax under section 722) (attach schedule)		
18.	Excess profits tax		

CLAIM REJECTED

3373957

RECEIVED

TAYLOR

7/16/48

QUESTIONS

- (a) Date of incorporation 1913 (b) State or country Missouri
- (c) Collector's office in which your income tax return for the taxable year was filed St. Louis
- (d) Is this a consolidated return? NO If so, procure from the collector Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of the consolidated income tax return.
- (e) In computing the excess profits credit under the invested capital method, do you elect to include in excess profits net income interest received on, reduced by the amount of amortizable bond premium under section 125 attributable to, all Government obligations described in section 22(b)(4) of the Internal Revenue Code? (Answer "yes" or "no") _____
- (f) Are you a transferor or transferee upon an exchange as defined by section 760 or 761 of the Internal Revenue Code? (Answer "yes" or "no") _____
- (g) Does this return involve an adjustment of the excess profits tax liability due to the application of the sections specified in (f) below? (Answer "yes" or "no") _____ If answer is "yes":
- (1) Check the appropriate sections and submit schedules showing computation: 710(a)(4) ☐; 721 ☐; 726 ☐; 731 ☐; 735(b) ☐; 735(c) ☐; 736(a) ☐; 736(b) ☐ (See General Instructions E, F, G, H, and I.) (Enter amount of excess profits tax as Item 18 (b), page 1.)
- (2) From the schedules submitted under (1) above, enter any tax adjustment which results from the application of each of the following sections: 721, \$ _____; 726, \$ _____; 731, \$ _____
- (3) From the schedules submitted under (1) above, enter any income adjustment which results from the application of each of the following sections: 721, \$ _____; 731, \$ _____; 735(b), \$ _____; 735(c), \$ _____
- (A) State amount of total assets as of the end of the taxable year. (From Form 1120, page 4, line 8, last column), \$ _____
- (f) Has a constructive average base period net income under section 722 been used in computing the excess profits credit used on this return? _____ If the answer is "yes," was such constructive average base period net income finally determined? _____ Or, if not finally determined, is it used pursuant to permission granted by the Commissioner? _____ If the answer to the first question is "yes," the following questions should be answered and the required information furnished:
- (1) Is the amount of the constructive average base period net income so used the same as that which was finally determined or permitted? _____ If the answer is "no," attach statement setting forth reasons for the variance and the amount thereof.
- (2) If the constructive average base period net income resulted from the application of section 722 (b) (4) or (5) or section 722 (c), are the facts and circumstances different in the taxable year from the facts and circumstances with respect to which the claim for relief was first allowed? _____ If so, attach statement containing a brief description of the difference and an account of its effect upon the business of the taxpayer for the taxable year.
- (3) State the amount of the excess profits credit for the taxable year computed without regard to section 7 _____ \$ _____
- (g) Is any unused excess profits credit adjustment computed with the use of a constructive average base period net income? _____ If the answer is "yes," attach schedule showing computation.

Schedule A. EXCESS PROFITS NET INCOME COMPUTATION

Line No.	COLUMN 1 INCOME CREDIT METHOD		COLUMN 2 INVESTED CAPITAL CREDIT METHOD	
1. Normal-tax net income (computed without allowance of credit for income subject to excess profits tax and without allowance of dividends received credit) (item 38, page 1, Form 1120)	\$		\$	7,168 37
2. Net short-term capital gain (do not enter net short-term capital loss)				
3. Adjustment to net operating loss deduction				
4. Decrease in deductions limited by income				
5. 50 percent of interest on borrowed capital	XXXXXXX	XX		2,699 40
6. Interest on Government obligations (see question (e) above, for election)	XXXXXXX	XX		
	\$		\$	10,068 27

1998

Line No.	1. Year Ended	2. Year Ended	3. Year Ended	4. Year Ended
1. Normal-tax (or special-class) net income				
2. Net capital loss used in computing line 1				
3. Securities which are capital assets deducted in computing line 1 as bad debts or as stock determined to be worthless (for taxable years beginning prior to January 1, 1937)				
4. Net loss from sale or exchange of property other than capital assets deducted in computing line 1 (for taxable years beginning after December 31, 1937)				
5. Net loss from involuntary conversion of property deducted in computing line 1				
6. Total of lines 1 to 5				
7. Net capital gain used in computing line 1				
8. Net gain from sale or exchange of property other than capital assets used in computing line 1 (for taxable years beginning after December 31, 1937)				
9. Net gain from involuntary conversion of property used in computing line 1				
10. Total of lines 7 to 9				
11. Difference between lines 6 and 10				
12. Net gain from sale or exchange of capital assets after considering net capital loss carry-over				
13. Net gain from sale, exchange, or involuntary conversion of property other than capital assets				
14. Total of lines 11 to 13				
15. Net loss from sale, exchange, or involuntary conversion of property other than capital assets				
16. Stock and securities of affiliated corporations which became worthless during the taxable year (if included in line 2, 3, or 7)				
17. Total of lines 15 and 16				
18. Normal-tax (or special-class) net income after applying section 711 (b) (2) (line 14 minus line 17)				
19. Net short-term capital gain after considering net capital loss carry-over (do not enter net short-term capital loss)				
20. Dividends received credit				
21. Deductions on account of retirement or discharge of bonds, etc.				
22. Casualty, demolition, and similar losses not taken into account in computing line 12, 13, or 15				
23. Repayment of processing tax to vendor				
24. (a) Abnormal judgment liabilities, etc. (attach statement)				

Total. (Enter as item 22, page 1)

Total. (Enter as item 24, page 1, subject to 5 percent limitation.) (See instruction 23)

Schedule J.—DEPRECIATION. (See instruction 23)

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Cost or Other Basis (Do not include land or other nondepreciable property)	4. Assets Fully Depreciated in Year at End of Year	5. Depreciation Allowed for other years in Prior Years	6. Remaining Cost or Other Basis To Be Recovered	7. Estimated Life Used in Accounting for Depreciation	8. Estimated Remaining Life From Beginning of Year	9. Depreciation Allowable This Year
SCHEDULE ATTACHED								
Total. (Enter as item 25, page 1)								

Schedule K.—OTHER DEDUCTIONS. (See instruction 29)

SCHEDULE ATTACHED

THIS RETURN HAS BEEN PREPARED
FROM INFORMATION SUBMITTED BY
TAXPAYER. SAID INFORMATION HAS
NOT BEEN AUDITED OR VERIFIED BY
KESSLER AND/OR CHERVITZ.

QUESTIONS

1. Date incorporated 1913 2. State or country Missouri
2. If incorporated in 1945, indicate whether (a) completely new business ☐, or (b) successor to previously existing business, which was organized as (1) corporation ☐, (2) partnership ☐, or (3) sole proprietorship ☐, or (4) other (indicate) Deficit. If successor to previously existing business, give name and address of the previous business organization St. Louis
3. Collector's office where the corporation's return for the preceding year was filed St. Louis
4. Enter amount of income (or deficit) from Item 34, page 1, Form 1120 for 1944 \$4,778.24
5. The corporation's books are in care of company Located at _____
6. Enter the approximate number of stockholders at the close of the taxable year _____
7. Did the corporation during the taxable year have any Government contracts or subcontracts? (Answer "yes" or "no") no. If answer is "yes," state the approximate aggregate gross dollar amount billed during the taxable year under all such contracts and/or subcontracts. (See instruction G-(3).) _____
8. Is the corporation a personal holding company within the meaning of section 501 of the Internal Revenue Code? no. (If so, an additional return on Form 1120 H must be filed.)
9. Is this a consolidated return? no. (If so, procure from the collector of internal revenue for your district Form 851, Affiliations Schedule, which shall be filed in, sworn to, and filed as a part of this return.)
10. If this is not a consolidated return: (a) did the corporation own at any time

- during the taxable year 50 percent or more of the voting stock of another corporation either domestic or foreign? no; or (b) did any corporation, individual, partnership, trust, or association own at any time during the taxable year 50 percent or more of the corporation's voting stock? no. (If either answer is "yes," attach separate schedule showing: (1) Name and address; (2) percentage of stock owned; (3) date stock was acquired; and (4) the collector's office in which the income tax return of such corporation, individual, partnership, trust, or association for the last taxable year was filed.)
11. Is this return made on the basis of cash receipts and disbursements? no. If not, describe fully in separate statement accrual
 12. Has the corporation in this return taken a deduction for any amount of wages or salaries representing an increase or decrease in rate? (Answer "yes" or "no") no. If so, attach statement as required by instructions 16 and 17.
 13. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis is used, explain fully in separate statement, giving date inventory was last reconciled with stock.
 14. Did the corporation make a return of information on Forms 1004 and 1009 or Form W-2a for the calendar year 1945 (see instruction G-(1))?
 15. Has any transaction described in instruction G-(4) occurred on or after October 3, 1940? (Answer "yes" or "no") no
 16. Did the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? no. (If so, attach statement as required by instruction K-(3).)

(a) Other property		
2. Contributions (excess over 5 percent limitation)		
3. Federal income and excess-profits taxes	1,835	43
4. Income taxes claimed as a credit in whole or in part in item 43, page 1		
5. Federal taxes paid on tax-free covenant bonds		
6. Excess of capital losses over capital gains		
7. Additions to surplus reserves (list separately):		
(a)		
(b)		
8. Other unallowable deductions:		
(a)		
(b)		
9. Adjustments not recorded on books (itemize):		
(a)		
(b)		
10. Sundry debits to earned surplus (itemize):		
(a)		
(b)		
11. Earned surplus and undivided profits at close of the taxable year (Schedule L)	8,310	39
12. Total of lines 1 to 11	10,145	82

(a) Interest on:	
(1) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	
(2) Obligations of the United States:	
(i) Obligations issued on or before September 1, 1917; all postal savings bonds; Treasury notes issued prior to December 1, 1940; and Treasury bills issued prior to March 1, 1941	
(ii) United States savings bonds and Treasury bonds owned in the principal amount of \$5,000 or less, issued prior to March 1, 1941	
(iii) United States savings bonds and Treasury bonds owned in excess of the principal amount of \$5,000 issued prior to March 1, 1941	
(3) Obligations of instrumentalities of the United States:	
(i) Obligations of Federal land banks, joint stock land banks, and Federal intermediate credit banks issued prior to March 1, 1941	
(ii) Obligations issued by other instrumentalities of the United States prior to March 1, 1941	
(b) Other nontaxable income (itemize):	
(1)	
(2)	
16. Charges against surplus reserves (itemize):	
17. Adjustments not recorded on books (itemize):	
not operating loss ded.	7,339 02
18. Sundry credits to earned surplus (itemize):	
19. Total of lines 13 to 18	10,145 82

EXCESS PROFITS TAX. (See Instructions for Form 1121)

- (a) Is an excess profits tax return on Form 1121 being filed for the taxable period covered by this return?
- (b) If a personal service corporation (other than a member of an affiliated group of corporations filing a consolidated return) signifies below its name not to be subject to the excess profits tax, it shall be exempt from such tax and the provisions of Supplement B, Chapter I, shall apply to the shareholders in such corporation who were such shareholders on the last day of the taxable year of the corporation. (Attach Form 1121-P)
- (c) If corporation claims exemption under section 727 of the Internal Revenue Code, state basis of claim.
- (d) If an excess profits tax return is not being filed for the reason that it is claimed that the excess profits net income computed under the invested capital method is not greater than (1) \$10,000 for a taxable year ending in 1945, or (2) an amount equal to the sum of the portion of \$10,000 applicable to the part of the year falling in 1945 and the portion of \$25,000 applicable to the part of the year falling in 1946, in case of a taxable year beginning in 1945 and ending in 1946, the following Schedule N should be filed in. The completion of Schedule N does not constitute the filing of an excess profits tax return.

Schedule N.—EXCESS PROFITS NET INCOME COMPUTATION

1. Normal-tax net income (computed without credit for income subject to excess profits tax and dividends received credit) (Item 28, page 1)	2.	3. Dividends received credit adjustment (Item 15, page 1, including the sum of (a) dividends received (actual or constructive) from foreign personal holding companies, and (b) dividends received on stock held primarily for sale to customers by a dealer in securities)	4.
2. Net short-term capital gain (do not enter net short-term capital loss)	3.	7. Net gain from sale or exchange of capital assets (Item 12 (g), plus item 23, page 1)	8.
3. 50 percent of interest on borrowed capital	4.	8. Income from retirement or discharge of bonds, etc.	9.
4. Adjustment to net operating loss deduction under section 711 (a) (3) (L)	5.	9. Refunds and interest on Agricultural Adjustment Act taxes	10.
5. Total of lines 1 to 4	6.	10. Recoveries of bad debts	11.
		11. Total of lines 6 to 10	
12. Excess profits net income (for purpose of determining necessity for filing return) (line 5 minus line 11)			

Exhibit R.

Schedule C.—EXCESS PROFITS CREDIT—BASED ON INVESTED CAPITAL

Line No.	Equity Invested Capital at the Beginning of the Taxable Year (See Instructions for Schedule C, lines 1 to 12, inclusive)		
1.	Money paid in for stock, or as paid-in surplus, or as a contribution to capital		\$ 300,000 00
2.	Property paid in for stock, or as paid-in surplus, or as a contribution to capital		
3.	Distributions of earnings and profits in stock of the corporation		
4.	(a) Accumulated earnings and profits	\$	
	(b) Adjustment for transferor's deficit under section 718 (c) (5)	\$	
	(c) Increase or decrease under section 761 (d) (1) on account of intercorporate liquidation	\$	
	(d) Accumulated earnings and profits (item 4 (a)) as adjusted by item 4 (b) and (c)		
5.	25 percent of new capital paid in during a taxable year beginning after December 31, 1940		
6.	Increase on account of intercorporate liquidation under section 761 (d) (2)		
7.	Deficit in earnings and profits of another corporation under section 718 (a) (7)		
8.	Total of lines 1 to 7		\$
9.	Less: Distributions made prior to the taxable year not out of accumulated earnings and profits	\$	
10.	Earnings and profits of another corporation required to be deducted by section 718 (b) (3)		
11.	Decrease on account of intercorporate liquidation under section 761 (d) (2)		
12.	Deficit in earnings and profits included in invested capital of another corporation (section 718 (b) (5))		
13.	Total of lines 9 to 12		
14.	Equity invested capital at beginning of taxable year (line 8 minus line 13)		\$ 300,000 00
Average Addition to Equity Invested Capital During the Taxable Year (See Instructions for Schedule C, lines 1 to 12, inclusive)			
15.	Money paid in for stock, or as paid-in surplus, or as a contribution to capital	\$	
16.	Property paid in for stock, or as paid-in surplus, or as a contribution to capital		
17.	Distributions of earnings and profits (other than earnings and profits of the taxable year) in stock of the corporation (see line 24, below)		
18.	25 percent of new capital		
19.	Increase on account of intercorporate liquidation under section 761 (d) (2)		
20.	Deficit in earnings and profits of another corporation under section 718 (a) (7)		
21.	Total additions in lines 15 to 20		
22.	Total of lines 14 and 21		\$
Average Reduction in Equity Invested Capital During the Taxable Year (See Instructions for Schedule C, lines 1 to 12, inclusive)			
23.	Distributions not out of earnings and profits of the taxable year	\$	

[fol. 80] HENRI CHOUTEAU, on behalf of plaintiff, testified that he and his wife acquired controlling interest in the International Building sometime in the year 1920. I do not remember how much I paid for this interest. It was a long time ago. I know we bought control but I do not remember amount of stock bought. At the time we bought the building in 1920, the top eleven floors were practically finished, with some minor completions that had to be done. About nine-tenths was finished. I do not know the condition of the building in 1913. The finishing of the top eleven floors was practically through when I took the building over in 1920. I am under the impression that Mr. Gregg, who was the manager at that time, was instrumental in completing the top eleven floors but just what date I don't remember. At one time the International Building got its heat from the Title Guaranty Building next door. You could see the remains of where the pipes came through into the building. At the time I acquired the building in 1920, there was no fifth elevator there. I installed that about 1922. I don't remember the exact date. At the time I acquired the building in 1920 there was a complete heating plant in the building. I recall that for the year 1920 the Government made objection to our basis for depreciation of \$860,000. That sum was set up as a basis for depreciation in 1920. Either in 1926, 1927 or 1928 I got a letter from the Government stating they had confirmed our value of \$860,000 for depreciation and Mr. Dyer, my attorney, told me the matter was settled. I remember he gave me a lot of papers at that time and I went over, how many times I don't remember, to a hearing or a conference with Revenue Agents had on Eighth and Olive Street. There were papers submitted at those hearings or conferences and it went on a week or two and I think we submitted everything we had to confirm our position that the building cost \$860,000. I received Exhibit "W" a day or two subsequent to March 27, 1929 through the mail, and I turned it over to Mr. Dyer. This Exhibit "W" is in the same condition as when received. (A photostat of Exhibit "W" was then offered in evidence, which was objected to because it was a revenue report covering the year 1927 and its admissibility was challenged on the ground of being irrelevant and immaterial [fol. 81] to the years in suit or the base date, and was

Social Security Taxes
Federal Income Tax
Missouri Income Tax

<u>322.14</u>	13,351.79	13,351.79
	<u>258.62</u>	
	<u>\$13,610.41</u>	<u>\$15,187.39</u>

SCHEDULE J - Depreciation

Property	Acquired	Est. Life	Cost	Depreciation Allowed	This Year
Building on leased ground	1913		870,383.00	462,500.00	12,500.00
Office equipment		15 years	84.55	---	5.64
	1945	15 years	<u>198.65</u>	<u>---</u>	<u>6.62</u>
			<u>870,666.20</u>	<u>462,500.00</u>	<u>12,512.26</u>

NET OPERATING LOSS DEDUCTION

Loss for 1943	2,562.78	
Loss for 1944	<u>4,776.24</u>	<u>7,339.02</u>

SCHEDULE K - Other Deductions

Electric current	8,239.42
Coal	2,690.30
Paint & brushes	1,867.01
Janitor supplies	1,821.31
Millwork and alterations	3,406.37
Water	482.71
Electric lamps and supplies	178.21
Plumbing and hardware	171.82
Insurance	1,683.86
Stoker maintenance	477.40
Wall and window cleaning	2,342.50
Uniforms	75.32
Venetian blinds and shades	186.10
Telephone	212.18
Amortization of mortgage debit expense	830.97
Professional and supervision fees	1,750.00
Miscellaneous expenses	<u>1,387.67</u>
	<u>27,803.15</u>

Exhibit R.

6-5

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7. Difference between item 1 and item 6	\$	\$
8. Adjusted excess profits net income (item 7, column 1, or item 7, column 2, whichever is applicable)	\$	\$ None
9. 95 percent of item 8	\$	\$
10. Net income (item 36, page 1, Form 1120)	\$	\$
11. Less: (a) Dividends received credit (85 percent of total of column 2, Schedule E, Form 1120, but not in excess of 85 percent of item 10 above (excluding from the computation dividends received on certain preferred stock of a public utility))	\$	\$
(b) Credit for dividends paid on certain preferred stocks if taxpayer is a public utility (20 percent of line 20, page 2, Form 1120)	\$	\$
12. Surplus net income (computed without regard to the credit provided in section 26 (e) (sum of lines 18 and 21, page 2, Form 1120) and without regard to 80 percent of the credit provided in section 26 (h))	\$	\$
13. 80 percent of item 12	\$	\$
14. Income tax under Chapter 1 (other than section 102) for the taxable year (item 42, page 1, Form 1120)	\$	\$
15. Excess of item 13 over item 14	\$	\$
16. Item 9, or item 13, whichever is lesser	\$	\$
17. Amount deferred by reason of the application of section 710 (a) (5) (relating to abnormal loss under section 722) (attach schedule)	\$	\$
18. Excess profits tax:		
(a) Item 16 minus item 17	\$	\$
(b) If schedule is filed under question (g), page 2, amount of tax as computed in such schedule	\$	\$
(c) Item 18 (a) or item 18 (b), whichever is applicable	\$	\$
19. Less: Credit for income taxes paid to a foreign country or United States possession allowed to a domestic corporation (portion not used in computing item 43, page 1, Form 1120)	\$	\$
20. Item 18 (c) minus item 19	\$	\$
21. Less: Credit against excess profits tax (10% of item 18 (c))	\$	\$
22. Item 20 minus item 21	\$	\$
23. Amount, if any, due to application of section 734, adjustment in case of position inconsistent with prior income tax liability (attach schedule)	\$	\$
24. Excess profits tax due (item 22 plus item 23, or item 22 minus item 23, whichever is applicable)	\$	\$ None

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself depose and says that this return (including any accompanying schedules and statements) has been examined by him and is to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations thereunder.

Subscribed and sworn to before me this 28th day of February, 1946



William H. Hallen Notary Public
(Signature of officer administering oath) (Title)



Samuel H. Hearn
(President or other principal officer) (State title)
Henry J. Hearn
(Treasurer, Assistant Treasurer, or Chief Accounting Officer) (State title)

I we swear (or affirm) that I we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the excess profits tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 28th day of February, 1946



William H. Hallen Notary Public
(Signature of officer administering oath) (Title)

Kurt J. Lindner
(Signature of person preparing the return)
Reisler & Chavitz
(Name of firm or employer, if any)

Exhibit R-1.

P-1

lowed? If so, attach statement containing a brief description of the difference and an account of its effect upon the business of the taxpayer for the taxable year.

(3) State the amount of the excess profits credit for the taxable year computed without regard to section 732. \$

(4) Is any unused excess profits credit adjustment computed with the use of a constructive average base period net income? If the answer is "yes," attach schedule showing computation.

Schedule A. EXCESS PROFITS NET INCOME COMPUTATION

Line No.	COLUMN 1 INCOME CREDIT METHOD		COLUMN 2 INVESTED CAPITAL CREDIT METHOD	
1. Normal-tax net income (computed without allowance of credit for income subject to excess profits tax and without allowance of dividends received credit) (item 38, page 1, Form 1120)	\$		\$	7,168 87
2. Net short-term capital gain (do not enter net short-term capital loss)				
3. Adjustment to net operating loss deduction				
4. Decrease in deductions limited by income				
5. 50 percent of interest on borrowed capital	XXXXXX	XX		2,899 40
6. Interest on Government obligations (see question (c) above, for election)	XXXXXXXX	XX		
7. Total of lines 1 to 6	\$		\$	10,068 27
8. Net gain from sale or exchange of capital assets (item 12 (a) plus item 33, page 1, Form 1120)	\$		\$	
9. Income from retirement or discharge of bonds, etc.				
10. Refunds and interest on Agricultural Adjustment Act taxes				
11. Recoveries of bad debts				
12. Increase in deductions limited by income				
13. (a) Dividends received credit adjustment (item 13, page 1, Form 1120, excluding dividends received from foreign corporations)			XXXXXXXX	XX
(b) Dividends received credit adjustment (item 13, page 1, Form 1120, excluding dividends received from foreign personal holding companies and dividends received on stock held primarily for sale to customers by a dealer in securities)	XXXXXXXX	XX		
14. Nontaxable income of certain industries with depletable resources				
15. Total of lines 8 to 14	\$		\$	
16. Excess profits tax net income computed without regard to deductions applicable to life insurance companies (line 7 minus line 15)	\$		\$	
17. Deductions applicable to life insurance companies				
18. Excess profits net income computed under income credit method or invested capital credit method (line 16, or line 16 minus line 17 in case of a life insurance company)	\$		\$	10,068 27

10-41112-1

THIS RETURN HAS BEEN PREPARED
FROM INFORMATION SUBMITTED BY
TAXPAYER. SAID INFORMATION HAS
NOT BEEN AUDITED OR VERIFIED BY
KESSLER AND/OR CHERVITZ

13. Net gain from sale, exchange, or involuntary conversion of property other than capital assets.							
14. Total of lines 11 to 13.	\$		\$		\$		\$
15. Net loss from sale, exchange, or involuntary conversion of property other than capital assets.	\$		\$		\$		\$
16. Stock and securities of affiliated corporations which became worthless during the taxable year (if included in line 2, 3, or 7).	\$		\$		\$		\$
17. Total of lines 15 and 16.	\$		\$		\$		\$
18. Normal-tax (or special-class) net income after applying section 711 (b) (2) (line 14 minus line 17).	\$		\$		\$		\$
19. Net short-term capital gain after considering net capital loss carry-over (do not enter net short-term capital loss).							
20. Dividends received credit.							
21. Deductions on account of retirement or discharge of bonds, etc.							
22. Casualty, demolition, and similar losses not taken into account in computing line 12, 13, or 16.							
23. Repayment of processing tax to vendee.							
24. (a) Abnormal judgment liabilities, etc. (attach statement). (b) Abnormal expenditures for intangible drilling and development costs (attach statement). (c) Other abnormal deductions (attach statement).							
25. Capitalization of expenditures for advertising or promotion of goodwill (attach statement).							
26. Total of lines 18 to 25.	\$		\$		\$		\$
27. Income from retirement or discharge of bonds, etc.	\$		\$		\$		\$
28. Dividends received from domestic corporations.							
29. Net gain from sale or exchange of capital assets after considering net capital loss carry-over (line 12, above).							
30. Total of lines 27 to 29.	\$		\$		\$		\$
31. Excess profits net income (line 26 minus line 30).	\$		\$		\$		\$
32. Net aggregate of columns 1, 2, 3, and 4.							
33. Increase in lowest year in base period (attach statement).							
34. Total of lines 32 and 33.							
35. Average base period net income—General average (line 34 divided by number of months in base period, multiplied by 12). <small>(Fill in lines 36 to 42 for computation of average base period net income where there are increased earnings in last half of base period.)</small>							
36. Net aggregate of columns 3 and 4, line 31 (see instruction regarding limitation applicable to taxable year ending after May 31, 1940).	\$		\$		\$		\$
37. Net aggregate of columns 1 and 2, line 31.	\$		\$		\$		\$
38. Excess of line 36 over line 37.	\$		\$		\$		\$
39. One-half of line 38.	\$		\$		\$		\$
40. Line 36 plus line 39.	\$		\$		\$		\$
41. Line 40 divided by number of months in second half of base period, multiplied by 12.	\$		\$		\$		\$
42. Average base period net income—Increased earnings in last half of base period (line 41, or the highest excess profits net income for any taxable year in the base period, whichever is lesser).	\$		\$		\$		\$
43. 95 percent of line 35 or line 42, whichever is greater.	\$		\$		\$		\$
44. Net capital addition, \$ _____; or net capital reduction, \$ _____ (attach statement).							
45. 8 percent of line 44, if a net capital addition (or 6 percent of line 44, if a net capital reduction).							
46. Excess profits credit—based on income (line 43 plus line 45, if a net capital addition) (or line 43 minus line 45, if a net capital reduction).	\$		\$		\$		\$

objected to on the further ground that it was offered for the purpose to develop some sort of quasi estoppel and each tax year was a separate tax year and whatever action was taken by the revenue agent did not bind the Commissioner in the absence of a closing agreement. Counsel for plaintiff stated that the only purpose in offering it was to show that there was an admission against interest on Page 9 of the Exhibit. The Court received it subject to objection. The Court observed with reference to said Exhibit that the fact that the Court was concerned with a situation that took place some 38 years ago, the difficulty of getting evidence bearing on the factual issue was apparent and might widen the scope of the evidence.)

On cross examination, Mr. Chouteau testified that William M. Fitch was at one time his attorney, but could not remember whether he was an officer of the company. The Mr. Dyer that he referred to was H. Chouteau Dyer and was my counsel at one time. I do not know of my own knowledge what the original cost of the building was and the cost of the later capital addition. That has been a long time ago. The finishing of the building was practically completed when I purchased it in 1920. Witness was shown a document and asked whether that bore his signature and stated that it was his affidavit.

"Q. Now that affidavit, Mr. Chouteau, states that the building was [removed] about the year 1910. Does that have reference to the finishing of these so-called "unfinished floors"? A. I don't remember.

Q. So then you are not sure whether the building was practically completed by 1913 or whether, as a matter of actual fact, it was not finally and fully completed in the year 1910?

A. I would not know. That is 40 years ago. I don't recall the circumstances under which this affidavit was prepared.

Q. If I suggested that this document was prepared on your behalf and signed by you and submitted to the United States to consider, in order to arrive at a basis, would you say that was a fair and correct statement and probably what happened? A. I would not.

Q. You would not? No. Would you deny that was the fact?

[fol. 82] A. What is that—20—40 years ago? I just don't remember.

The Court: What is the date of the affidavit?

Mr. Frank: The date of the affidavit, sir, is 1929.

A. You must remember that running the International Building is not the only work that I do."

I do not know who bore the actual cost of finishing the building. Mr. Frank has represented us in earlier years involving this same issue. I am not aware of the fact that Mr. Frank reported to the United States at one time at a conference that the finishing of the building was actually done by a tenant, the International Insurance Company.

Our minute book is available. I have never examined it with reference to that particular fact. With respect to the availability of old books and records of the Company starting in 1913, there was a time when I lost control of the building around 1941 for about three or four years. We got control of it again about 1944. With respect to availability of old books and records of the company, we have an accountant that does the income tax work for us, keeps the books in the building company's office, which is not mine, and we have an attorney. I don't remember seeing the books. If we got them, I imagine it was after the receivership was over. I don't know.

Mr. Frank then stated that whatever books were subpoenaed, some of them having been found as late as Monday night, were very dirty and dusty.

Mr. Frank came to my office and we looked at one spot that had a couple of old books in it. As far as I know, the books are kept in the company's office upstairs. I don't know whether representatives of the Internal Revenue Bureau have for many years made request for these books. I have no independent recollection as to the cost of either the original construction or that of the additions. I know the condition—what the condition was in 1920. Mr. Gregg was the manager of the building when we bought it and retained that position until he died. He had been with the building before that for a good many years. He should have been in a position to know what the situation was with respect to completion and costs of the building. With reference to the \$860,000 base for [fol. 83] depreciation, Mr. Dyer came over and told me the matter was settled. We have had a good deal of dispute about it and we produced a lot of books and papers a good many years ago. I remember going over on 8th and Olive

for conferences over there. I was relying on what Mr. Dyer told me and on the letter I got which stated that \$860,000 was the cost of the building as far as we were concerned. I do not know about Mr. Dyer writing the local office of the Bureau of Internal Revenue a letter dated February 12, 1926 that the cost to complete the building was \$165,000. Mr. Dyer is in Court.

H. CHOUTEAU DYER, on behalf of plaintiff, testified that he was a practising attorney at the bar for over fifty years but was practically retired and was now a farmer. In the early 1920's, he represented the International Building Company in tax matters and prepared the returns beginning in 1920. Beginning that year \$860,000 was made a basis for depreciation. In succeeding years I had conferences with the Revenue Department with reference to that depreciation basis. I don't remember what I submitted to the Revenue Department. I know that we discussed the matter as to valuation, as to the documents submitted, I cannot recall. Subsequently, through the International Building Company, I received notification that the \$860,000 basis had been approved. This figure as a basis for depreciation was accepted subsequent to that and the basis was not questioned in any of the returns up to 1933. That was the last return I handled for I no longer represented Mr. Chouteau. I do not recall any particular document submitted. This Exhibit "W" dated March 27, 1929 was given to me either by Mr. Gregg or Mr. Chouteau and I had it in my files. Prior to this letter I do not recall receiving any advice from the Revenue Department that the \$860,000 base had been accepted and was substantiated. That has been a long time ago. I recall discussing the matter because the rate of depreciation was argued between me and the Government representative. The government insisting the rate was 2% and I insisted the rate be 2½% and I showed the government the reason why. Because the building was next to a railroad tunnel and in those years there were many freight trains using it, it caused excessive vibration [fol. 84] and for that reason there was a greater depreciation than a normal building would have been subjected to and they allowed the 2½%.

Cross-Examination.

I never received any documents from the Revenue Department on the depreciation basis question. I know that the Government had finally disposed of it after receiving that letter—I did not receive it personally, but it came to me through International Building Company, and I continued to set up that figure in the returns. I had no complaints and I received no objections. I assumed the matter was settled and approved from what was said in that letter and report. I do not recall the matter of the data I submitted to the government; you are asking me something that is 30 years ago. I recognize my signature on this letter from me dated February 12, 1926. Part of the paragraph reads, "The cost of completing the building, which amounted to \$165,000, is the true [value] of the property, a total of \$885,000."

Redirect Examination.

That letter dated February 12, 1926 I assume is part of the data I submitted at the conferences I mentioned, but memory is a treacherous thing. I don't remember.

SAM A. KESSLER, on behalf of plaintiff, testified that I am a certified public accountant, a member of the firm of Kessler & Chervitz, and am an attorney entitled to practice at the bar of this court. I have just examined a book headed on the fly-leaf, "Cash Book of International Building Company", the front part of which has a record on the left-hand side of the sheet referred to as "Cash Receipts" and on the right-hand side "Cash Disbursements". That would ordinarily be called a cash book. The record indicates the first entry being May 1, 1913. In the back of the book it seems to start from right to left, or entries indicating what is called a Journal, containing Journal entries; the first journal entry is dated December 31, 1920. Apparently the book is divided into two sections. The front part being used for cash receipts and disbursements and the back of the book [fol. 85] being used for Journal entries. On page 398 of that book, the first entry appearing on page 398, dated

13. Total of lines 9 to 12.....			
14. Equity invested capital at beginning of taxable year (line 8 minus line 13)		\$ 300,000	00
Average Addition to Equity Invested Capital During the Taxable Year (See instructions for Schedule C, lines 1 to 12, inclusive)			
15. Money paid in for stock, or as paid-in surplus, or as a contribution to capital.....	\$		
16. Property paid in for stock, or as paid-in surplus, or as a contribution to capital.....	\$		
17. Distributions of earnings and profits (other than earnings and profits of the taxable year) in stock of the corporation (see line 24, below)			
18. 25 percent of new capital.....			
19. Increase on account of intercorporate liquidation under section 761 (d) (2).....			
20. Deficit in earnings and profits of another corporation under section 718 (a) (7).....			
21. Total additions in lines 15 to 20.....			
22. Total of lines 14 and 21.....	\$		
Average Reduction in Equity Invested Capital During the Taxable Year (See instructions for Schedule C, lines 1 to 12, inclusive)			
23. Distributions not out of earnings and profits of the taxable year.....	\$		
24. Stock distributions from accumulated earnings and profits at beginning of year (see line 17, above).....	\$		
25. Decrease on account of intercorporate liquidation under section 761 (d) (2).....			
26. Deficit in earnings and profits included in invested capital of another corporation (see line 718 (b) (5)).....			
27. Total reductions in lines 23 to 26.....			
(See instructions for Schedule C, lines 23 to 26, inclusive)			
28. Average equity invested capital (line 22 minus line 27).....		\$ 300,000	00
29. Average borrowed capital (attach schedule).....	\$		
30. Average borrowed invested capital (50 percent of line 29) not needed, therefore, not computed			
31. Average invested capital (line 28 plus line 30).....	\$		
32. Total inadmissible assets.....	\$		
33. Total admissible and inadmissible assets.....	\$		
34. Percentage which line 32 is of line 33.....			
35. Reduction on account of inadmissible assets (..... percent of line 31).....			
36. Invested capital (line 31 minus line 35).....		\$ 300,000	00
37. Portion of line 36 (not over \$5,000,000); and credit at 8 percent.....	\$ 300,000	00	8%
38. Portion of line 36 (over \$5,000,000, but not over \$10,000,000); and credit at 6 percent.....	\$		6%
39. Portion of line 36 (over \$10,000,000); and credit at 5 percent.....	\$		5%
40. Excess profits credit—based on invested capital (total of lines 37 to 39).....		\$ 24,000	00

16-41112-1

December 31, 1921, and is a debit to profit and loss account, depreciation in the sum of \$21,500, and a credit to reserve for depreciation in the sum of \$21,500. There is a notation in parentheses "3% on value of building, \$766,666.66". That is one of the component parts of a profit and loss statement. A debit being charged to expense in the sum of \$21,500, and a credit being set aside for the creation of a reserve fund. At page 388 of this book dated 1925, there are further profit and loss entries. The one relating to depreciation is an entry on the bottom of the page, debit to profit and loss in the sum of \$18,448.92, and a credit to reserve for depreciation, building in the sum of \$17,200, and also a credit to reserve for depreciation of boilers, \$1248.92. "2% of \$860,000 or \$17,200, and 10% of \$12,489.17 or \$1248.92", per "Revenue Agent's report as of 12-31-1920 or 1921."

"Q. In its report of deficiency for the years in question in this case, the government took a computation of economic value by Hoskold's Formula, then they took a computation of value by reconstruction value, both as of 1913, added the two together, and divided the two, and said that that was the depreciable cost of the building, basis of the building, rather, basis of depreciation for the building as of May 1, 1913. Now will you please tell us what Hoskold's Formula is?

A. Hoskold's Formula is a formula set up to determine present value of periodic payments that will be received from a certain source, on the assumption that you will reinvest your money that you receive from time to time, at a certain rate of interest, and is based on the assumption that that periodic payment received will be uniform each year during the period under review or discussion.

Q. So then if the return each year is not uniform for each year, from the preceding year, then, from your experience as an accountant would the application of Hoskold's Formula be applicable to the rentals of the building that fluctuate from year to year?

A. I would say no, inasmuch as the formula is based [fol. 86] entirely on the assumption that the revenue or income will be absolutely uniform in each of the years, in a case where the income is variable and changed from year to year, I would say that Hoskold's Formula would not be applicable."

William Kismiller is considered an authority on tax subjects, issuing Co-Ordinators Cyclopedic Tax Service. I would say that was an authority on income taxes. On page 1010, paragraph 227.68 in Co-Ordinators Cyclopedics Tax Service, issued 1945, it states this about Hoskold's Formula:

"A. Section 227.70. Hoskold's Formula and Table. Hoskold's Formula, in contrast to Chart I in the preceding section, is based on the periodical receipt of income in equal installments. Consequently, its use presupposes uniform annual earnings; if the property to be valued will not have uniform earnings over the estimated life, the formula should not be used."

Cross-Examination.

This book of the International Building Company is really two books in one. A cash book in the front of it and a Journal in the back of it. I first saw this book about two days ago and never saw it before. I have made no verification as to the authenticity of these entries. From an accounting standpoint, if there are no entries for capital additions, they would have to be taken as expenses. If an entry is not capitalized, it would be an expense. I am not an engineer. As to my experience as to values, I have had none in an engineering capacity. Only from book work as to the accounting features of it, and my experience with Hoskold's Formula is based on what I have read in books. It is usually limited to patent royalties and the like. In depreciation of buildings and valuation of buildings, I have not come across the use of Hoskold's Formula in my work relating to real estate. We examine books of companies that own real estate and prepare returns for taxpayers on real estate. I have never had occasion to use Hoskold's Formula in connection with real estate. It is my belief that Hoskold's Formula is not properly used with respect to valuing real estate where the income varies from year to year. If the income were [fol. 87] the same from year to year, I would say Hoskold's Formula would be applicable, but where it differs from year to year, it is not applicable. In cases where the income is fixed, the capitalized earnings would be a proper way to determine value. Using Hoskold's Formula, taking a given figure, say \$22,000, and you receive that over

a course of "N" number of years. Hoskold undertakes to tell you what the present value of that is now. Any table will give you what amount at compound interest and will produce a given sum of money, but Hoskold goes a little further in his Formula and concludes that the money coming back each year from this investment will be reinvested at 4% interest, which is all an assumption. Now, if a building will in one year bring \$22,000 and the next year bring \$109,000 or several years later, I don't think Hoskold's Formula would be applicable.

"The Court: Now you are asking the witness to use both Hoskold's Formula, together with the economic value?

Mr. Nickman: That is correct.

The Court: How can you use the two?

Mr. Nickman: Well, I meant with the reproduction cost.

The Court: Well, you are making it more complicated. How can you use the two?

The Witness: I don't see how he can, Judge. Using Hoskold's method with cubic feet, I don't know of any predetermined method of combining two. That is just one opinion.

The Court: It sounds to me—I am looking for information. At the outset, it looks like the old arithmetic principle that if you add horses, cats, and dogs, you have a hard time telling what the answer is.

Mr. Frank: That is our contention in this case."

EDGAR³ W. NORTON, on behalf of plaintiff, testified that he was a certified public accountant and had been practising public accounting for about 20 years. That he was familiar with what is known as Hoskold's Formula.

[fol. 88] "A. Well, it is a method for computing a present valuation based on standard present value tables, adjusted so as to take into consideration sinking fund. The formula is based on an assumption that certain property will have a certain number of years' life in number of years' life and that the property will pro-

duce a uniform fixed income over—annually, over its expected life.”

JOHN H. FARISH, testifying on behalf of plaintiff, stated, I am in the real estate business and have been in that business for the past 60 years and during that period of time I have erected, bought and sold large office buildings. I built the Metropolitan Building, the Shubert Building, the Wall Building, the Pineate Building, the Linmar Building, the Vanolive Building, and the Humboldt Building. They are all reasonably good sized buildings, having a million or more cubic feet, being about half the size of the International Building. The Metropolitan Building is 8 stories high and the Humboldt Building is 6 stories high. I have bought and sold large office buildings a number of times and I am conversant with the fair market values of buildings as of May 1, 1913.

I built the Metropolitan Building in 1907. I know the International Building, having been around that neighborhood for 60 years, ever since it was built in 1906-07 and I have been in it many times. I have had occasion to visit the upper floors above the 6th floor. The construction of these upper floors is about the same as the lower floors; good, first class construction. It has the regular finish of office buildings. Taking into consideration the location of the building, the business conditions in 1913, the age of the building being constructed in the years 1906-07, the fact that it is a 99 year leasehold and still had approximately 92 years to run, taking into consideration its [cubicle] content of 1,853,000 cubic feet, the fair market value with its top eleven floors unfinished in 1913 would be between \$650,000 to \$700,000 dollars, and if the top 11 floors were finished, the building could have [fol: 89] been sold for about \$850,000. The leasehold estate itself, the right to use the ground and build on it, had no value. The land was worth just about the rent of \$20,000 per year. I would not take into consideration its actual building cost in 1907, or the improvement cost of the upper 11 floors because 1913 was a period in which buildings cost more to erect than in 1906-07, and I am estimating the value of the building in 1913 fully completed as to the 17 floors, with elevators and heating plant.

If the building was assessed in 1913 for \$500,000 I would say that would be about 80% of its reproduction value.

Cross-Examination.

By building buildings I mean I selected a piece of ground and secured the capital necessary to build the building. I was not the building contractor. I estimate reproduction cost at 45¢ per cubic foot, in 1913. I built one good sized building of a million cubic feet for 34¢ per cubic foot, but as the years went along and there was more building in 1907, 1908, 1909 and 1910, the cost increased up to 40¢. It was a gradual increase, so that I estimate in 1913, the cost per cubic foot would be over 40¢ in 1913. Depreciation is something that should be considered, but inasmuch as the building was only six years old, I never thought much about depreciating it in 1913, but it is an element that should be considered if you figure it closely. The leasehold estate itself had no value. The leasehold did. I think the leasehold estate on the basis of \$20,000 rent a year had no value of its own.

When asked the question concerning the renting of the building assuming the top floors to be unfinished, and the building not suitable for full occupancy as to whether or not a \$20,000 fixed ground rent was excessive by about \$10,000, "I would not say that much." I had the same experience in the Metropolitan Building when I put it up in 1907. I did not finish it and it was on leased ground, because I was not certain I could fill the building with tenants right away, but I did finish it two or three years afterwards. The same condition must have been present with the International Building. The original owners were not sure they could fill the building with tenants, but the building of course was paying too much rent on the basis of \$20,000 ground rent, but the moment it was [fol. 90] finished, then it was about reasonably right. If it was not finished, they would be paying excess rent of around \$7,000.00. There are certain rules that we go by, but the ground floor of a big office building should pay the rent on the ground and the taxes. Between the years 1907 and 1913, it was hardly doing that, so therefore, it was too much rent for those six years up to 1913.

In giving my answers of the values of the building or rather the negative value of the leasehold estate, I took into consideration other properties in the immediate

vicinity. Otherwise, I could not have an opinion. I would say that the northwest corner of 4th and Washington Avenue was valuable ground in 1913. That is where the Missouri Athletic Association is located. Rented for \$19,000 on a 99 year lease. It was executed in 1915, showing a 97¢ per square foot value, it was a superior piece of ground at a considerably lower value than the International Building.

In my experience buying and selling commercial [real] estate the earnings of a property is a thing that you have to take into consideration. I understand the term of market value as being what a willing buyer would pay and a willing seller would accept. The earnings of a building are an index of value. The market value of property depends on earnings. I could not get the previous earnings of the building. If the building had no earnings prior to 1913 because it was built in that year, I would consider the earnings after the building had been finished, and if I only knew the 1913 earnings I would have to consider the value of the building as of no market value if it only brought in \$24,000. But you have been asking me always about reproduction value. You have not asked me about market value except right now. I could not give you the value of building as of 1913 if you can't give me all the earnings for the full calendar year of 1913. If the earnings in the building were \$24,000 in 1914, the market value of the building would be around \$600,000 because there is a future value. It is hard to say how I arrive at that figure. The building, of course, was well located for real estate and lawyers offices, and a buyer would figure that the income was going to increase in the following years. I might have figured it on a 4% rate for that year figuring later I was going to get a better rate. The fact that the building is located near a tunnel with [fol. 91] freight trains rolling through there would not depreciate anything from its value. It was not a so-called "blighted area" in 1913. The tunnel did not affect the value of the Arcade Building which is also near it on 4th and Olive, nor did it affect the value of any other office buildings on 8th Street. You can't call an area a "blighted area" if the rents are increasing.

I have been around there ever since 1891 and I have never figured it to be a "blighted area".

Income is an important factor in appraising property, but not the only factor.

Redirect Examination.

Frequently a willing buyer purchases a piece of property from a willing seller where the earnings value of the property is very low because the willing buyer believes there is a great prospective value in the property.

ROBERT A. BURNS, testifying on behalf of plaintiff, states that I am in the real-estate business in St. Louis since 1909, and I have had experience in building, buying and selling of large properties. We have built several hundred buildings, residences, apartments, stores and one six-story building. We have built a large variety of buildings. I am acquainted with the International Building since 1907. From my experience in buying and selling building property, large properties, taking into consideration the location of the International Building, the age of the building in 1913, its potential earning power, the business conditions prevalent at that time and further taking into consideration that it was built on a 99-year leasehold paying \$20,000 per year rent, and that the entire building had been completed, it is my opinion that the fair market value on May 1, 1913 would be about \$750,000. I believe I could have sold the building for that price at that time. If the top 11 floors had not been finished on that date, I would say its fair market value would be between \$575,000 to \$600,000.

[fol. 92]

Cross-Examination.

Arriving at the fair market value of a building is a matter of opinion. I have valued property for 40 years. I have appraised all sorts of property for the government. The thirty-seven blocks on the riverfront, the five hundred pieces for the big small arms plant on Goodfellow Avenue—the buildings, and so on; appraised the new Federal Administration Building for the government, and I used my own opinion as to what they are worth under those conditions, and about what an investor would pay for it. Without knowing all the details I cannot give you an opin-

ion as to the cost per cubic foot of construction in 1913 for office buildings. I would not say that the \$20,000 fixed rental was not a fair rate. There is no comparison between the building on the northwest corner of Fourth and Washington under a 99-year lease and the International Building under the 99-year lease. The location depends upon what the buyer wants to use it for. A buyer would not want to put up a 16-story office building on 4th and Washington Avenue. I have made no preparation to testify in this case and have made no arrangements for compensation for doing so.

Redirect Examination/

I have an office in the International Building and have had for the last 18 years. About a week ago Mr. Chouteau and Mr. Frank came to my office and asked me if I could testify and give my opinion as to the value of the building in 1913.

The deposition of RICHARD A. BOYLE was introduced in evidence on behalf of plaintiff:

My name is Richard A. Boyle. I am a realtor and have been in that business 59 [near]. I formed the November Investment Company. It has no connection with the Missouri-Lincoln Trust Company nor was it a subsidiary of that company. November Investment Company was controlled by me. I secured a 99-year lease on behalf of the November Investment Company from the Liggett Estate. And the reason I called it the November Investment Company was because the lease was dated November 1, 1905 for 99 years.

[fol. 93] The company under the terms of that lease then erected the building known as the "Liggett Building". The cost of the building to erect was about \$575,000, not including carrying charges. We did not finish the building. We finished only a few floors with the idea of getting those rented first before we built any more. We sold it quickly after it was constructed. There were about 11 floors unfinished. We sold the building and leasehold in the summer of 1907 for \$775,000, to the West-end Realty Company.

Cross-Examination.

As to whether the building was finished for occupancy by May 1, 1913, I was a tenant there for 38 years, I cannot tell you if everything was finished by that time. I had then no financial interest in the building but the finishing went on from time to time, but when it stopped I couldn't tell you. It is very likely that there were tenants occupying some upper floors on May 1, 1913. I had no occasion to delve into that. I cannot tell you whether the International Life Insurance Company was a tenant on the 16th floor at that time. They may have been there in May of 1913. They changed the name of the building after that. When they went into the building. I had nothing to do with that. There may have been tenants on the upper floors in May 1913, I don't know when the International Life Insurance Company moved in. I had nothing to do with the management at that time. I was only a tenant. I don't think the United States was a tenant on one of those upper floors in 1913 because there were no partitions there. I know a great deal about office buildings. I have been handling this Title Guaranty Building for six years and just recently sold it for clients and I have put up other office buildings besides the International Building. We did not finish the building because we sold it so quickly. By finished I mean partitioning and renting the upper floors, and also putting in a heating plant and an extra elevator. We did not do those things because there was no occasion for them. It is not true that when we sold the building boilers were available awaiting installation. That is not a fact. What the heating arrangements were in 1913, I do not know. I had no control over the management. I was only a tenant. I knew J. K. Gregg [fol. 94] as the manager of the building. I had nothing whatever to do with him. I was only a tenant in 1913. I have no knowledge regarding the installation of the heating plant or the installation of the 5th elevator. It was after my ownership. I knew that the top 11 floors had been finished and that a heating plant had been installed and a 5th elevator had been installed, but I had no connection with it as I was only a tenant. I was there in the building 38 years and knew a lot that was going on in the building, but all I really know was what was being

done. I do not know the cost. I know what I thought it would cost. The manager of the building should know what it cost. I had been in a position to know pretty much what was done and what was not done. The manager of the building would certainly be in a position to know what it cost if he was remembering it accurately. By finishing the upper 11 floors of a building you take into consideration the installation of partitions, decorations, lighting fixtures and a great many other things. The cost is three or four times now what it was then. That building today would be three million to put up. I know nothing about the details of the finishing. Why should I? I was merely a tenant at that time. I know only what it costs to fix up office buildings. It would cost about three million dollars to put that building up today.

Plaintiff closed its case.

[fol. 95] HENRY R. WEISELS, testifying on behalf of defendant: I am in the real estate business in my 56th year here in St. Louis. I have traded and sold a lot of property in the downtown area. I sold the southwest corner of 12th and Olive. I appraised and assembled the site for the Missouri Pacific Building at 13th and Olive, and I appraised and assembled the site of the Plaza-Olive Building, next to the Missouri Pacific Building. I appraised the southeast corner of Broadway and Locust Street of the Boatmen's Bank Building Annex. I appraised the Ambassador Building, the Board of Education Building, the Syndicate Trust Building, for the Treasury Department of the State of Missouri; the Chemical Building; the Equitable Building, the Railway Exchange Building. I was appointed as Commissioner on the Jefferson Memorial, and also was appointed as Commissioner for the Federal Commerce Building. I am a member of the National Association of the Realtors. I am a member of the Real Estate Board, I am a member of the Society of Industrial Realtors, the Bankers Mortgage Bankers and the Insurance Board. The Society of Industrial Realtors is a society of about four or five hundred men in the United States who have to be qualified to become a member: there

are four in St. Louis. I have bought and sold real estate on behalf of buyers and sellers and on my own account. Our annual volume is from two and a half million to five million. I am familiar with the property values and leasehold estates in the vicinity of 8th and Chestnut Streets in the City of St. Louis. I am acquainted with the International Building and I was familiar with it in 1913. When the building was built, we moved into the International Building on the corner as a tenant, first floor. I was a tenant there 16 or 17 years. I was asked to make a study of the International Building property with a view to testifying here today. The fair market value is what a willing buyer is willing to pay and a willing seller is willing to sell. I have an arrangement with the Government regarding my compensation, but it does not depend on the outcome of this case. In preparing my testimony here I keep a record and have kept one for 40 years of transactions that have occurred in the downtown area of leases and sales over this period. I checked into these various leases and sales in preparation to testify. I am quite familiar with office buildings as we handle two of them downtown.

- [fol. 96] I have studied the various rentals and values including offers to buy. I have gone over the stipulation of facts in this case and have studied the stipulation and the tables set forth in Paragraph 14 containing the average net income from the building from the year 1913 to 1949. That preparation was for the purpose of arriving at the fair market value on May 1, 1913. Taking into consideration all these matters and facts, my opinion is that the fair market value of the plaintiff's interest is \$400,000.

In arriving at that value, I took the 8 months' operation of 1913, and the 1914 income showing \$24,000 a year. In my experience, you have to capitalize that income on a 6% a year basis. It figures 6% on \$400,000, or \$24,000 a year. That is net after the \$20,000 ground rent has been paid.

According to my analysis, the leasehold interest here affects the total market value of the lessors' interest and impairs it seriously. \$20,000 ground rent is way out of reason. When the lease was made, it had a negative value. I would say that rent was excessive and in computing it

in 1913, the land was assessed at \$165,500. On the basis of 66 $\frac{2}{3}$ % of true value, the true value at that time would be \$247,500 for the land. Now, if you figure the land on a long term 99-year lease on that basis at 5%, the fair rent on that at that time, 1913, would have been \$12,375, so there is a difference of \$7,625 that the Liggett Estate obtained for that property more rental than it was worth at that time, in my opinion.

"Q. In other words, you don't think a buyer would be willing to pay over \$400,000 due to the adverse effect of this ground rent?

A. You ask me the question, what was the fair market value of that property in 1913, and want my answer. Four hundred thousand is what it possibly could have been sold for, yes, sir.

Q. That is your top maximum of value?

A. I don't see how I could go any further. Capitalize at six per cent on that rental."

[fol. 97] "• • •"

The Court: Well, I still don't understand how he arrived at it. Valuation of \$400,000."

In arriving at the valuation of \$400,000 I consider the earnings of the property in 1914, but did not consider any other years. I don't think it would be proper to use any other year other than 1914. I mean that a \$24,000 income for 1914 is 6% on a \$400,000 valuation. We capitalize on a 6% basis; that is what I capitalized it on. The general locality there in 1913 was just a so-so location. South of it was an old building. There were a lot of bums around there at 8th and Market and south of there was what was called "Hop Alley". That was a notorious place that the Police Department very frequently raided, but that would not have any particular effect on this building. Across the street was an old three-story building; on the southwest corner, and the northeast corner had three old buildings. There is no retail business at all; it is all real estate offices.

In response to a question as to whether the neighborhood there was not a progressive area or a stagnant area, "I would say it was static."

Cross Examination.

Yes, we had an office on that corner; had it for 16 or 17 years. I did not say it was a bad neighborhood. We were considered at that time one of the leading realtors of St. Louis, and we would not have had our office in a so-so neighborhood. I testified that the fair market value of the building on May 1, 1913 was \$400,000 and it was on the 1914 income alone on a 6% basis that I arrived at that market value. I took nothing else into consideration. I did not take into consideration the location of the building. I did not take into consideration the location of the building or the fact that it was right next to the Title Guaranty Building a few feet away, another office building, and that it was diagonally opposite the Wainwright Building, another office building where the real estate exchange is located. The Real Estate Exchange for a time had quarters in the International Building. I have taken everything into consideration and have answered the question of market value and my experience has been, [fol. 98] Mr. Frank, that no investor would buy that building if it was covered with diamonds, unless he could get a six per cent net return, that would include fee.

I did not take into consideration its potential earnings after the year 1913. If I did not know what the 1914 earnings were or any subsequent year or what they were from the time the building was built in 1906, I would not appraise the property unless I knew the earning capacity for it for at least 10 years in the past or ten years in addition. I would not make an appraisal unless I knew what the earning power of the property was and capitalized it at 6%, and it is on that that I based my answer alone.

I did not take into consideration the potential earning power of the building. Beyond that or on any other date. I took it at that date. If the earnings in 1920 were \$64,000, and in 1921, \$62,000, and in 1922, \$72,000, and in 1923, \$102,000, it would make no difference in my appraisal. I do not think I should take into consideration the prospective earnings of the building. If I were right now in the year 1913 and did not know what it was going to earn in 1914, I would not make an appraisal unless I knew what the earnings were. In my experience I have sold a build-

ing for a good deal more than the income warranted, because the men felt it had a great future.

"Q. Well, could that be true in this case in a 17 story office building?

A. I couldn't answer that. I am aware that the building was built in 1906-07 at a cost of \$575,000, not including the finishing of the top 11 floors. I am aware that the finishing of those 11 floors would cost about \$165,000."

The witness was then asked the question would he still say the fair market value of the building was \$400,000, and his answer is:

"Well, my answer is, I cannot answer that question."

The opinion of Mr. Farish as to real estate values and his experience is highly regarded in this City.

Redirect Examination.

It makes no difference whether the top 11 floors were completed or not. I used the 1914 income of the building [fol. 99] in forming my opinion of its value. That is usually the accepted method of valuing property. If the United States put a valuation on the property at that time of \$430,000, I would say that the Commissioner was a little bit generous.

Recross-Examination.

I was not aware that this building leasehold sold in July 1907 for \$775,000. I missed that fact in reading the stipulation of facts. It would make no difference in my opinion. I don't recall whether or not the International Building at that time was the newest office building in St. Louis. Most of its tenants have for many years been lawyers and real estate men and insurance offices, mostly real estate men.

Redirect Examination.

"Questions by the Court:

Q. Mr. Weisels, I got the impression from your testimony that you really did not need to look at this building to value it? A. My hearing is a little [big] bad.

Q. I got the impression from your testimony that you did not really have to look at this building, to value it,

that all they needed to tell you was what the net income was and from that you could tell, is that it?

A. No, no, I would judge a building, too, if it was—

Q. Well, why do you look at the building?

A. Well, we look, see it every day.

Q. I asked you why do you look at the building to find the value?

A. We get the number of square feet in it, the cubical contents, and so forth.

Q. Well, what has that got to do with the value?

A. Well, because of the—amount of rental, the rental is what fixed the value, in my opinion:

Q. That is what you said in your previous testimony?

A. That is right.

[fol. 100] Q. Then, why couldn't government counsel have said to you, "Here is a building that has a net rental of \$26,000"— A. Yes, sir.

Q. On that one statement alone, as I understand your testimony, you could fix the value of the building?

A. I would fix the market value—not the building—I fix my market value of the property, Judge. The market value of the leasehold, less our interest in the building leasehold. I did not fix the value of the building at all.

Q. Well, we are not talking about the same thing.

A. Well, in other words, in my experience—

The Court: I understand that, but you have been testifying—and I want to understand you— A. Yes, sir.

Q. I don't want to misunderstand you, and I am not sure that you have intended to make some of the answers you have made. You said that your sole basis of value of the leasehold interest is the net rental income?

A. Yes, sir.

Q. Well, then, why was it necessary for you to know anything more than the net rental— A. Well—

Q. Wait a minute. To put a rental value on this building?

A. We have to take into consideration, of course, the physical location of the property, and so forth.

Q. All right, now tell me why you have to take that into consideration.

A. Well, if it was just a—if it was a one-story building, of any ordinary building would not bring that much rent,

\$24,000 a year net after paying the leasehold, why, we couldn't value it the same, but in my appraisal of properties right straight through, we have to consider and have always considered what net, as market value, what the property yields. That is what I meant.

Q. Well, here was a 17-story building, wasn't it?

A. Yes, sir.

[fol. 101] Q. In 1913 six stories were being rented?

A. Yes, sir.

Q. And there were eleven stories on top of them that were bringing in no rental? A. That is right.

Q. Well, don't you think those eleven unrented stories were entitled to some consideration in value?

A. They wouldn't if they weren't bringing—there was no rental from them and I could only take what was physically in the building, what the annual income—the net income of twenty-four, of course, was low, because the upper floors were not occupied, and in subsequent years it was even less than that. Now, I can not take a building and figure out a building worth seven hundred or seven hundred fifty thousand dollars as the market value in 1913, if the building only yields, after all expenses, a net of twenty-four thousand.

Q. Well, let's put it another way: supposing there was a 17-story building there and they just finished the first floor and rented the first floor and it brought in a rental of a thousand dollars a month; but there were sixteen floors waiting to be finished—all they had to do was finish them: would you look at that building and give no consideration to those sixteen floors, not give them a value?

A. One story, I would, well, have to figure—of course, I realize from the question, if they only finished one floor and the rental—and it cost that much, but still—only take into consideration what might happen in the future—repeat it.

Q. Well, how would you value that building—only the first floor is rented, the other sixteen floors are not finished?

A. Well, I would have to go into the question of what all those floors rent for and the possible future value of it, what it might yield if it was finished.

Q. Well, why do you do that if sixteen floors are not finished, but you refuse to recognize any rental value,

prospective, in eleven floors? A. That is my opinion. We [fol. 102] have the same thing in the Federal Reserve Bank Building.

The Court: I am not talking about that. You are excused. That is all. Step down."

WARNER N. GRAHAM, testifying on behalf of defendant: my occupation is Internal Revenue Agent for about 20 years and here in St. Louis in the Bureau for two years before that; at present I am assigned to the conference section and in 1925 I was a revenue agent for complete examination of cases assigned to me. After a return is assigned to me, I would get out the files in the office prior reports and make a study of them, call at the taxpayer's office and try to verify the return from the books and records available. Our files may have a history of the case or certain points may be involved in prior years that are involved in the current year's return examination. They would contain prior agents' reports. I recall having made an examination and report in connection with the International Building Company covering the years 1920-21. This is an original typed copy of a report on the International Building for the years 1920-21. There are some enclosures; there is another letter attached to the file dated October 13, 1925 from J. D. Gregg and it is addressed to Mr. Henry C. Dyer. The last two lines of that letter read:

"This cost with the division in the basement and including the sky-light on the seventeenth floor, \$165,000."

That refers to the completion of the upper 11 floors. (The witness's attention was then directed to a certain portion of a paragraph in his report and asked to read it to refresh his recollection.) The taxpayer claimed a cost on their building of \$860,000 for depreciation purposes. That was in its return. I interviewed a representative of the taxpayer and asked for information to verify the cost and the taxpayer submitted these letters based on a claim for transferer's basis of the sale of \$714,000, plus \$165,000 additional cost to complete 11 floors which was approximately \$860,000 and it was allowed on that basis. That

was for the years 1920 and 1921. My report is dated November 5, 1925. Reading from my report:

[fol. 103] "A. The books can not be located for this building prior to 1913. But the taxpayer [calimed] a cost of \$860,000 and submitted letters enclosed which approximately substantiate this value, which is allowed for depreciation purposes. The building was purchased without partitions or plumbing fixtures, and so forth, completed on ten floors, which were completed prior to 1913."

The taxpayer submitted the letters and the first letter dated October 7, 1925, addressed to Mr. Henry Chouteau from J. E. Fogg reads as follows:

"A. At your request, will say, to my best recollection, the Liggett Building, now known as International Building, located on the southeast corner of Eighth and Chestnut Streets, St. Louis, Missouri, was sold by me for the owners to the Missouri-Lincoln Trust Company in July, 1907, for a consideration of \$714,000.00. In this transaction, I acted merely as agent,"

The last letter attached to the report is written on the stationery of the International Life Building, Eighth and Chestnut Streets, J. K. Gregg, Manager. It is addressed to H. Chouteau Dyer, Boatmen's Bank Building, and signed J. K. Gregg. The first two paragraphs read:

"A. Relative to your inquiry on the work I did between the years 1907 and 1913, during which period I was Manager of the International Life Building, at the time called the Liggett Building, to the best of my knowledge and belief, was as follows:

"At that time there were no partitions in said building from the seventh floor to the fourteenth floor, inclusive, and from the sixteenth floor to the seventeenth floor, inclusive. As an example: The seventh floor had been occupied by a railroad company with the space open, that is, no partitions outside of the hallways shown on the plats."

Another portion of the report reads under the heading, "Explanation of Items" as follows:

[fol. 104] "A. Boilers and heating plant cost \$11,919.17 installed in 1920, disallowed under expense and capitalized. The building had been furnished heat by another company prior to 1920 and did not have boilers and heating plant. In 1920 boilers were installed to heat the building, and the cost is a capital expenditure and not an allowable deduction, and must be capitalized and depreciated over life thereof."

The taxpayer had charged the cost of the boilers to operating expenses and claimed deduction on its income tax return, and that was disallowed as an expense and we capitalized it to be depreciated over its life. The report states that the matters were discussed with Henri Chouteau, President, and he was advised of the results of the report. I arrived at the figure of \$860,000 for substantiation purposes as per the letter which stated the cost to the Missouri Lincoln Trust Company as \$714,000 in 1907 plus \$165,000 addition to complete the floors. I made no other verification of those statements. I arrived at that figure on a transferer's basis. That is what the report states.

"The Court: What do you mean by transferer's basis?

Mr. Nickman: Well, that is a basis that was set up, I believe. Where you have closely linked corporations, the next corporation, that is the succeeding corporation, it is the basis of the immediately preceding one where they are subsidiaries. Now, I think your Honor will find that in the law, under the revenue act—I am not up to the minute on this, but I believe after the revenue act of 1926, this theory of the law did not become effective until transactions starting January 1, 1921, so that, as a matter of fact, the law of transferer's basis, which came into effect later, would have no legal applicability to the year in question, 1913.

Q. Were you aware of what the situation was as to the law at that time, Mr. Graham?

A. I made a mistake. I was not.

The Court: Well, as I understand your testimony, when you were making this investigation, you were attempting to arrive at the value of this building on this leasehold,

and you took what information you obtained, and which I understand you referred to, and on the basis of that [fol. 105] information you arrived at that valuation?

A. Yes, sir.

The Court: You were not considering any particular law, you were ascertaining the facts, weren't you?

A. The report states it was based on the transferer's cost, which would be the original cost to the Missouri Lincoln plus the additions made since that time."

Cross-Examination.

The court directed that by agreement the letter dated October 13, 1925 on the stationery of International Life Building, signed by J. K. Gregg, be marked Exhibit "Z" and put in the record as an exhibit. Said Exhibit "Z" is as follows:

[fol. 106]

Exhibit Z.

International Life Building.

Property of International Building Company.

International Life Building,
Chestnut and Eighth Streets,
J. K. Gregg, Mgr.

Saint Louis, Mo.,
October 13th, 1925.

Mr. H. Chouteau Dyer,
Boatmen's Bank Bldg.,
Saint Louis.

My dear Mr. Dyer:

Relative to your inquiry on the work I did between the years 1907 and 1913, during which period I was Manager of the International Life Building, at that time called the Liggett Building, to the best of my knowledge and belief, was as follows:

At that time there were no partitions in said building from the seventh floor to the fourteenth floor inclusive, and from the sixteenth floor to the seventeenth floor in-

clusive. As an example: The seventh floor had been occupied by a railroad company with the space open, that is, no partitions outside of the hallways shown on the plats.

It was necessary for me upon the removal of this company to put in all partitions, except shown on plat, and nearly all wash basins, doors, trims, hall partitions, several electrical switches for each individual room, wash basins for each room, there being thirty-six partitions to the floor to install, and an average of twenty-one wash basins.

These partitions were constructed of either metal lath and plaster, or tile and plaster, all wood trim of oak material, the same were necessary to connect the rooms in suites.

This wood work was all finished in natural oak finish and garnish, and the walls were finished in oil, with florentine glass in frames facing the halls.

The hardware consisted of hinges, self closing springs, letter openings in doors and Yale locks, fit for master keys per floor, as well as separate individual keys for each door. Electric fixtures had to be installed in each room.

This cost with the division in the basement and including the sky-light on the seventeenth floor, \$165,000.

[fol. 107] As this work was done over a period of six to seven years, and also only done as the demand necessitated, and as I gave out the work in contracts and labor at times to different parties and did some of the work with our own crew, this figure I have given you is the minimum which I believe was spent.

Yours truly,

J. K. GREGG.

JKG:MKN

[fol. 108] "The Court: I have gotten the impression from what has been said heretofore—maybe erroneous—that there was no longer a contest over the fact that the top eleven floors were finished after the estate . . . Am I in error in that?

Mr. Frank: It seems to be. At the time this suit was brought, I was not aware of that, I did not have all that information.

The Court: I just wanted to make sure.

Mr. Frank: Yes.

The Court: I don't misunderstand this report.

Mr. Frank: That is right, your Honor.

The Court: You directed your questions to excerpts in that, and when you did so, I drew the conclusion you were conceding in effect—I am not saying so—but that the effect of your questioning was that you conceded that the finishing of those top eleven floors was after May 1, 1913.

Mr. Frank: That is correct. It goes to the value of the building at the time of the transfer, what its then condition was."

(Mr. Nickman, Government counsel, then told the court that the Government denied that the top eleven floors were finished after May 1, 1913 in response to a question from the court.)

Reading from my report is the following statement:

"The books can not be located for this building prior to 1913, but the taxpayer claimed a cost of \$860,000.00 and submitted the letters enclosed, which approximately substantiate this value, which is allowed for depreciation purposes. The building was purchased without partitions or plumbing fixtures, and so forth, completed on ten floors which were completed prior to 1913."

I got that information from Mr. Gregg's letter. It was the basis of my report so far as I know. I can't say that I saw the books of the International Building Company except for the years involved. The reason I did not have substantiation of the cost of \$860,000.00 was because the books did not reflect anything like that.

[fol. 109] "Q. Well, did you notice that the corporation had no books prior to 1913, because that was the year of its incorporation?"

A. The report refers to the building, not to this corporation.

Redirect Examination.

The letters that I have been discussing, attached to my report, referred to cost to transferer and that was what I was considering.

ROBERT J. CHAMBLIN, testifying on behalf of defendant, stated: I am an Internal Revenue Agent, 24 years in the St. Louis division and two years in Washington. I am 69 years old. During the years 1922-1927 I was assigned to the examination of income tax returns in the St. Louis Division. Verifying figures shown on the return with the books and records that are produced by the taxpayer and if there are no books or records we have to seek out other sources and do the best we can. An examination is somewhat different from an investigation. An investigation is when we really go more thoroughly and seek out information from every source possible. Whereas an examination is usually confined to the books and records and whatever is produced by the [taxpayer]. When a return is assigned to an agent, the prior revenue agents' reports usually accompany the return if there are any. From our past experience we make the examination we feel is necessary. We survey the return and may not contact the taxpayer at all if everything looks all right. We may make a spot check or may make a partial examination or we may see something wrong that we would like to clear up and we call on the taxpayer and make field investigation, then if we find that the return checks with the books and records, we may run across some unallowable deductions and we will adjust those and call it to the attention of the taxpayer. I examined the returns of the International Building Company for the years 1924, 1925 and 1926 and made a separate report of those years. Exhibit "W" is a copy of my report for the year 1927.

[fol. 109a]

Exhibit W.

(Certain Pages in Exhibit W have been omitted from this printed record as not being relevant.)

• Pages 1, 2, 6, 9, 10 and 13 of Exhibit W are as follows:

[fol. 110]

Exhibit W—Page 1:

Treasury Department.

Internal Revenue Service.

Office of

Internal Revenue Agent in Charge

St. Louis, Missouri.
March 27th, 1929.

In re: International Building Company,
722 Chestnut Street,
St. Louis, Missouri.

Date of report: March 13th, 1929.

Years covered: 1927.

There is attached a statement of adjustments which this office proposes to recommend, affecting your income tax liability, and a form of agreement as to final determination of tax liability. If the adjustments suggested are satisfactory and you desire an immediate review and final determination, the agreement, Form 866, should be signed by you and forwarded to this office. Interest is payable on deficiencies found due as set forth on the attached Form 882.

If you do not agree with the conclusions set forth in the inclosed statement it is desired that every opportunity be afforded you to present to this office any objections or additional information. You are accordingly granted thirty days from date of this letter within which you may,

if you so desire, protest the proposed adjustments. The protest and any additional statement of facts must be submitted to this office, executed in triplicate under oath, and should contain the following information:

(a) The name and address of the taxpayer (in the case of an individual the residence, and in the case of a corporation the principal office or place of business); (b) in the case of a corporation the name of the State of incorporation; (c) the designation by date and symbol of the letter advising of the proposed deficiency with respect to which the protest is made; (d) the designation of the year or years involved and a statement of the amount of tax in dispute for each year; (e) an itemized schedule of the findings to which the taxpayer takes exception; (f) a summary statement of the grounds upon which the taxpayer relies in connection with each exception; (g) in case the taxpayer desires a hearing, a statement to that effect; and (h) in case the protest is prepared or filed by an attorney or agent it shall have thereon a statement signed by such attorney or agent showing whether or not he prepared it and whether or not the attorney or agent knows of his own knowledge that the facts therein are true.

If a protest is filed it will be given careful consideration in this office before the recommendations are forwarded to Washington for action. In the event that you do not protest within the thirty-day period, the case will be forwarded immediately thereafter to the Bureau at Washington for review.

In the event the recommendations are not approved upon review in Washington, you will be notified and given opportunity to discuss the changes with this office, or should you fail to protest to this office, *any protest which you may subsequently file with Washington will be referred to this office for consideration.*

If a deficiency is indicated no remittance should be made until you receive notice of assessment from the Collector of Internal Revenue for your district.

Please acknowledge receipt by return mail.

Respectfully,

S. S. SINCLAIR,
Internal Revenue Agent in Charge.

Inclosures:

Statement of adjustments
Forms 866 and 882

GRR:HM

Form 850

Revised Aug., 1928

[fol. 111]

Exhibit W—Page 2.

Agreement as to Final Determination of Tax Liability.

This Agreement, made in duplicate under and in pursuance of Section 606 of the Revenue Act of 1928, by and between International Building Company, a taxpayer residing at, or having its principal office or place of business at 722 Chestnut Street, St. Louis, Missouri, and the Commissioner of Internal Revenue;

Whereas, there has been a determination of the tax liability of said taxpayer in respect of

Income Tax,
(Character of tax)
for the calendar year 1927,
(Period covered)

in the principal sum of Four Thousand forty dollars and ninety-two cents (\$4,040.92); and

Whereas, said taxpayer hereby agrees to this determination and consents to the assessment and collection of any deficiency in tax included in the amount of the principal tax liability so determined, together with any penalty or interest applicable thereto as provided by law, and/or to accept any abatement, credit, or refund made in accordance with such determination, together with any interest due thereon as provided by law;

Now, This Agreement Witnesseth, that said taxpayer and said Commissioner of Internal Revenue hereby mutually agree that the principal amount of such liability so

determined shall be final and conclusive if and when this agreement is approved by the Secretary of the Treasury or the Undersecretary.

In Witness Whereof, the above parties have subscribed their names to these presents in duplicate.

Signed this day of, 192..

.....
Taxpayer.

[If the taxpayer is
a corporation affix
its seal here.]

By

Signed, 192..
(Date)

.....
Commissioner of Internal Revenue.

By

The above agreement has been approved in accordance with the provisions of Section 606 of the Revenue Act of 1928, the approval being specifically enumerated on—

Schedule No.

Dated

(See Instructions on reverse side)

Please sign and return both copies.

.....
(Pages 3, 4 and 5 omitted.)

[fol. 115] Exhibit W—Page 6.

In re: International Building Company,
722 Chestnut Street,
St. Louis, Missouri.

March 13th, 1929.

Internal Revenue Agent in Charge,
St. Louis, Missouri.

An examination of the books and records of the above named taxpayer for the years 1927, inclusive, disclosed

the necessity of adjustments in connection with the tax liability, all of which are reflected in the following sheets, and result in this summary:

Year	Additional tax	Over- assessment
1924 .....	.....	.....
1925 .....	.....	.....
1926 .....	.....	.....
1927	\$1,880.92	.....
1928 .....	.....	.....
Totals	\$1,880.92	.....
Less add'l tax or overassessment .....	.....	.....
Net result	\$1,880.92	.....

(Signed) R. J. CHAMBLIN,
Internal Revenue Agent.

(Pages 7 and 8 omitted.)

[fol. 118] Exhibit W—Pages 9 and 10.

International Building Company.

The principal cause of the additional tax was the disallowance of excessive salaries and capital items.

The findings were discussed with Mr. H. Chouteau Dyer, Vice President and attorney for the company, who is very much opposed to the proposed additional tax and signified his intention of filing a protest.

Financial History.

The Building is located at Southeast corner of 8th and Chestnut Streets, St. Louis, Missouri, and was first occupied about January 1st, 1907 and was erected on a 99 year leasehold dated 12-31-05. In July 1907, the building and leasehold were sold or traded to the Missouri-Lincoln Trust Company. The Missouri-Lincoln Trust Company incorporated a holding company named November Investment Company of which all the stock was held by the

Trust [Coopany] and the building was then known as the Liggett Building. The Missouri-Lincoln Trust Company had financial difficulties and began liquidating and a lease was made with International Life Insurance Company in which the name of the building was changed to International Life Building. An attempt to sell \$450,000.00 in bonds on the building was unsuccessful, so a new corporation, International Building Company was incorporated in 1913 which sold \$300,000.00 in bonds, and balance of equity in building for \$300,000.00 stock which was held by Missouri-Lincoln Trust Company, and all but 425 shares was still held by it until 1920, when the stock was sold to Henri Chouteau. This information indicates that there was no change of ownership when transferred from one corporation to another and the cost would be the original cost to the Missouri-Lincoln Trust Company. The books cannot be located for this building prior to 1913, but the taxpayer claimed a cost of \$860,000.00; this value having been substantiated in prior examinations, therefore is allowed for depreciation purposes.

Schedule 1.

Year ended Dec. 31, 1927.

Net Income.

Net income as disclosed by books...	\$18,000.00
As corrected	29,932.74
Net adjustment	11,932.74
Unallowable deductions and additional income:	
(a) Excessive Salaries	8,656.43
(b) Capital items	3,448.75
Total	12,105.18
Nontaxable income and additional deductions:	
(c) Depreciation	172.44
Total	172.44
Net adjustment as above	11,932.74

[fol. 119]

Schedule 1 A. & 1 B.

The item of \$8656.43 represents excessive salary paid to the President Mr. Henri Chouteau. The total salary allowed the President for the year 1927, as shown in the Books was \$32,656.43, which has been reduced to 24,000.00.

At a conference held in the office of the Internal Revenue Agent in charge attended by the Internal Revenue Agent in Charge, Mr. W. N. Graham, the examining officer, and Mr. Henri Chouteau, the President of the corporation with respect to salaries paid the President for years 1920 and 1921. Internal Revenue Agent in Charge agreed to allow the salary of \$24,000.00 in 1921, but stated that amount should set a precedent for the amount allowable for later years, and as the amount is in excess of \$24,000.00 in subsequent years, this item will be adjusted when later years are examined.

In view of these facts the excess amount over the \$24,000.00 [id] disallowed.

(b) The capital item of \$3,448.75 represents the cost of furnishing and installing safety locks on five elevator cars and 87 enclosure gates. This being an addition and betterment it is disallowed as an expense.

(c) The item of \$172.44 represents depreciation on the additions to elevators at the rate of 10% per annum averaged over the year.

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(Pages 11 and 12 omitted.)

[fol. 122] Exhibit W—Page 13.

Name International Building Company.

Exhibit B.

Year ended Dec. 31, 19..

Reconciliation of Income Per Books With Income Per
Return and With Taxable Net Income.

Net income per books.....	18,000.00
Additions	
Deductions	
Net income per return of taxpayer...	18,000.00
Additions	
Excessive Salaries	8656.43
Capital Items	3448.75
	12,105.18
	30,105.18
Deductions	
Depreciation	172.44
	172.44
Taxable net income as shown on Schedule	29,932.74

Note: The \$18,000.00 income per books represents 6%
 of \$300,000.00 capital stock. All profit over this amount is
 paid to the President of the Company as salary.

(End of Exhibit W.)

[fol. 123] On the 9th page, part of that page reads, "This
 value having been substantiated in prior examinations,
 therefore, is allowed for depreciation purposes." That

value was \$860,000. The report on that same page indicates that I discussed the case with H. Chouteau Dyer, Vice President and attorney for the Company.

NORMAN B. ESHELMAN, testifying on behalf of defendant, stated: I am the Internal Revenue Agent in charge of the St. Louis Division, and have been such for about ten years. I manage the activities of the St. Louis Division, and I am familiar with the general office procedure relating to examinations and reports by agents.

Returns are assigned to internal revenue agents for examination; office files are made available to the agents; the agent plans his own work and decides for himself what type of examination is to be made. Upon the conclusion of the examination a report setting forth the results thereof is submitted. As a part of the procedure, agents are usually supposed to consult the office files first before making inspection. That has been the policy of the Bureau in excess of 28 years. I heard the testimony of Agents Graham and Chamblin and their description of what they did conforms to established office procedure.

GLENN A. RUGGLES, testifying on behalf of defendant, stated: I am a Valuation Engineer in the appraisal section of the engineering and valuation division of the Bureau of Internal Revenue in Washington, D. C. I have held that position 17 years. Prior to that I was in charge of the appraisal of real estate for the Missouri Pacific Railroad for 14 years, and prior to that made appraisals of real estate and made surveys and valuations reports with the Rock Island Railroad prior to that time; prior to that I was in charge of two successive condemnation jobs with the Rock Island [Railroad] in Arkansas.

I have had experience in making appraisals of real estate in St. Louis and St. Louis County. I appraised all of the Missouri Pacific [Railroad] property in St. Louis, [fol. 124] and during the [period], 1925 to 1927, I [I] made government appraisals of properties in St. Louis and St.

Louis County for the purpose of loans. During the period, 1937 to 1939, I was working for the Bureau of Internal Revenue and my duties were the same as now,—to review reports that come in from the field from revenue agents and from engineers; to make appraisals myself in the field; to hold conferences with taxpayers and to write reports on principally real estate valuation matters. These were activities which I conducted in Washington. As a part of my duties, I had occasion to prepare letters for and in behalf of the Deputy Commissioner of Internal Revenue. I have a file covering correspondence during that period with specific reference to the International Building Company. That file also contains copies of my memoranda in connection with one conference held with the taxpayer in Washington. The procedure is that a memorandum stating what was done in the conferences was made immediately afterwards, or very shortly after a conference and was made only for the files of the appraisal section unless it was something important that might go into the general file. There is a letter in this file written by William M. Fitch, Vice-President of International Building Company, dated May 27, 1937, wherein he asked if the Bureau had in its file any agreements made at some prior time concerning the basis for depreciation for the International Building Company. I prepared a letter in reply for the signature of the Deputy Commissioner as follows:

"There is no agreement in the file under valuation or cost of \$600,000 for the original building, nor to a cost of \$260,000 for additions, but if such an agreement should exist, which in the light of present facts appear to be based on incomplete information, it would be necessary to revise it in accord with the facts."

There is another letter in the file written by Mr. Fitch, dated December 1, 1937 in which he submitted affidavits of George S. Black, Vice-President of James Black Contracting Company, and of Richard A. Boyle, real estate operator, and of John H. Farish, real estate operator, and a letter from the Department of Public Safety of the City of St. Louis. These are all with respect to the value of the property. In reply to that letter, the Commissioner wrote Mr. Fitch that the affidavits of Messrs. Boyle and Farish contained no explanation of how they arrived

[fol. 125] at their conclusions and that they were not acceptable for that reason but that the Bureau was willing to make an offer of \$382,000 as a basis of depreciation for the building in May, 1913, in order to settle the case. That was a compromise offer. There is a memorandum of a conference held with Malcolm I. Frank on November 30, 1938, and January 20, 1939. I recognize Mr. Frank here in the Court room as being the same person referred to in the memorandum. The memorandum reads:

"The taxpayer's representative contends that the original construction cost of the building was more than \$600,000.00, but has offered no proof other than opinion affidavits. He claimed that the cost of the additions installed by a lessee, International Life Insurance Company, at its own expense, in lieu of rent and not reported as income by the taxpayer, should be added to the taxpayer's basis. He claimed that the leasehold or land had no value to his client. He claimed that sale of income capital stock in the building in 1920, particularly of \$92,000.00, had no bearing on the value of the stock in 1913. That should be value of the building in 1913."

According to that memorandum Mr. Frank stated that the cost of the additions were installed by a lessee, the International Life Insurance Company, at its own expense in lieu of rent. There is a verification of that statement in a conference report by a conferee in the St. Louis agent's office. There is no field verification by anyone that I actually know, according to the file.

In connection with my activities on appraisal of real estate, I have kept myself informed about changing building costs. I was not familiar with building costs in 1913. I can tell what building costs were in 1913, as different construction companies and different appraisal companies and construction magazines have made a study of building costs, some of them starting back before 1900. They have shown in tables relative costs of building in each year from 1913 on, and in the case of the other two, back in the 1800s, from that period on up to the present time. One of the construction industries' magazines is the Engineering News Record, which is a monthly—and it shows in each issue the construction index for that period, so that industry has a record of costs from back in the 1800s every year up to the present time. Those figures are available

[fol. 126] to appraisers, who will express their views, offer different figures. That is what I mean by examining competent authorities, and I can tell what building costs were in 1913.

If I base it on my own experience and judgment as of some time, if I know myself what building costs are at some period, I can relate that back to 1913 or 1900. I have kept current with these different statistical studies and authorities. I have to make appraisals all the time. Based on my experience, the cost of the construction of the International Building Company in 1926 when I was familiar with building costs in St. Louis, that kind of building could be built for about 70¢ per cubic foot. According to most of the building index figures, 1913 costs would be just about half of the 1926 costs, but the local situation is expressed in the cost study of Fruin-Colnon, which is recognized nationally as one of the authorities on building costs, shows that 1913 costs are a little bit less than half of the 1926 costs, so that if the cost was 70¢ in 1926, it would cost 31½¢ in 1913. Fruin-Colnon is a contracting company. Reconstruction cost of the building in 1913 [ould] be \$584,881 and if depreciation for six years from the time it was finished to 1913 would be deducted, it would leave a net cost of \$514,699.00. That \$584,000.00 would be a figure which would represent the completed—fully completed building. That would correspond with the \$585,000 cost reported for this building in the unfinished condition it was in.

I am familiar with the existence of the \$20,000 fixed ground rent on this case. Based on Mr. Weisel's testimony yesterday that the rental was \$7,625 more than it should be, based on the value of the land, the effect of that excessive rental on a fair market value of the property to an investor would be \$134,680, which is the result of capitalizing or discounting this \$7,625 at six percent for 44 years, which is the remaining life of the building. I state this assuming that the witness Weisel's testimony was correct.

"The Court: That is a rather violent assumption. I was not impressed with his testimony. I think the man is honest. I think he is dogmatic. He was so sure that the only way to be positive of the value was the income. That just does not impress me as reasonable.

Mr. Nickman: Well, I think he was going on the theory of what he understood market value to be.

[fol. 127] "The Court: I think he got committed and he was going to take the position, 'That is my story and I am going to stay with it.'

Mr. Frank: That was my impression.

The Court: Why, you might have a building, further construction coming along, and it is on a leasehold, you find that within a year or two that this construction—condemnation or something will withdraw that building, you have only got a year or two life. I think if he would stop and reason, he would see each one has to stand on its own bottom.

Mr. Nickman: Well, I think he was probably thinking the building may have some intrinsic value as brick and mortar, and would an investor be interested in brick and mortar.

The Court: Well, you take the case I was just suggesting, I don't think an investor would be interested at six per cent unless he could foresee that that building would have a normal life. An investor would suffer by taking a six per cent basis, and I think in this case, where the building is a 17-story building, only six floors completed, that failure to consider that you have got eleven floors that have a potential rental when completed, I think that was an argument on the part of the owner. No, I just don't think you can take a dogmatic rule of six per cent and apply it in all cases."

As a rule I would not say that the best practice to appraise income property was by estimating the cost. It is a general practise to appraise it from a measure of its income.

It is a general practice, in appraising income property, to appraise it from a measure of its income. It is proper and customary to appraise some properties on the basis of cost, of the estimated cost, or estimated cost less depreciation. Those—that kind of property would be service buildings, such as factories, private warehouses, or home, hospitals, things of that kind, in which income is not a pri-

mary factor, but in appraising property that produces income, it is regarded as the best practice by the best appraisers to approach it from an income standpoint.

Questions by the Court:

"Q. Do you know how this property was appraised by the government in reaching their valuation involved? [fol. 128] A. I think so, yes.

Q. Do you know? A. I will say yes.

Q. Well, how was it?

A. It was appraised in two manners. One a reproduction cost, and the other was by income, capitalization of income, and average taken of the two figures.

Q. In other words, you took both? A. I did not do that.

Q. Sir? A. I did not do that.

Q. Well, I mean the government did? A. Yes.

Q. I don't mean you personally, now. Your department used two methods?

A. Yes, sir. I could say this, if I may: that was a practice which was rather generally followed in the depression years, when reproduction cost—

Q. What do you mean by depression years, what years?

A. From 1930 to 1940. When construction—when income from property did not warrant construction at the cost prevalent at that time, and where the value based on income was greatly different from the estimated reproduction cost. In those years, it was rather—it was in some cities quite a common practice to compute the two and average them.

Q. Well, I notice in the complaint in this case—I don't know whether there is any dispute about it—in arriving at the income, that they estimated the remainder of the life of the building average net rental over the remaining life of the building, at May 1, 1913, was to be \$22,000.00 per year. An expectancy of forty-four years.

A. That would be the estimate of some basis on what he knew of the earning power of the property and the remaining life of the fifty years from May, 1913. Conditions were so erratic in the depression years that appraisers were rather hard put to find some reasonable way of valuing property, and few sales were taking place, to be used as a guide, so income and estimated reproduction cost used in the way of it at that time."

[fol. 129] Based on my experience and using the figure of \$24,000 as the net income for the year 1914, it being the first full calendar year in which the building was operated, and using the 6% formula, the value would be about \$400,000.00.

Cross-Examination.

I do not know that the method of figuring depreciation values in depression years has anything to do with its market value in 1913. I don't believe it has anything to do with it.

With reference to conferences that I had with you in Washington which were held on November 30, 1938, and January 20, 1939, I finished writing my memorandum on those conferences on March 29, 1939, signed it and put it in the file. That was about four months later.

"Q. Now as a matter of fact, Mr. Ruggles, see if this does not refresh your information: didn't I tell you that they were in our files, a [letter] from your department and addressed to Mr. Fitch, stating that the report of a Mr. Lindsay disclosed that the added improvements were made by the International Insurance Company, and didn't I tell you that I had been unable to make any verification of that, isn't that what I told you?

A. I wouldn't know. I have no record of that in this memorandum.

Q. And did not I show you this letter at the time that we had that conference, dated June 5, 1937, from the bureau, addressed to Mr. Fitch?

Mr. Nickman: May I see?

Mr. Frank: Yes, you can see it. I am just letting him look at it first.

The Court: Counsel may see it before he answers.

Mr. Nickman: That is what I thought, sir.

A. This is a letter written by me.

Q. Sir? A. This is a letter written by me.

Q. Well, didn't I show you that letter and tell you we had not been able to verify the fact that International Insurance Company had made those improvements?

[fol. 130] A. I rather think not, because I certainly would have covered that in the conference. The reason for writ-

ing the conference report is to include all the facts that have any bearings, and that would be a very important fact, which would probably be the most important fact to be discussed.

Q. Mr. Ruggles, have you got any letter in your file, either from Mr. Fitch or myself, that states such a fact?

A. Do you mean the fact—

Mr. Frank: That the International Life Insurance Company completed those upper eleven floors.

A. No, I don't have.

Q. You don't have any such letter, because there is none in existence, so far as you know, is there?

A. Not that I know.

Q. No. Now, you wrote this letter dated June 5, 1937, to Mr. Fitch, did you not, wherein you quoted the report of Mr. Lindsay to the effect that there was some information that the International Life had completed—Life Insurance Company had completed those top floors?

A. That is right.

Q. Isn't that true? A. Yes, sir.

Q. Now, isn't it a fact that at that conference that I had with you, I told you that I had investigated that and had not been able to verify it?

A. My report does not cover that, Mr. Frank.

Q. Well, you don't recall that.

A. No, I don't. I would think [thought] that that would be the—that was really the issue.

Q. Why, certainly. And is it not a fact that there is not a letter in your file, so far as you know, where there is any statement by Mr. Fitch or myself that the eleven floors were completed by the International Life Insurance Company, in lieu of rent?

A. No. These are the only—

Q. (Interrupting.) Yes.

[fol. 131] A. The only letters I have.

Q. That is right. Do you know that there is a copy of a lease between the International Life Insurance Company and the International Building Company, one of the exhibits in this case, are you aware of that?

A. That one-floor lease?

Q. No. I don't know what you mean.

Mr. Nickman: I don't think the witness understands the question.

Q. Are you aware that there is a lease attached as an exhibit in this case? A. I have seen a lease.

Q. You have seen that? A. Yes.

Q. That lease does not say anything about them finishing the floors? A. No.

Q. Does it? A. No.

Q. And have you heard any revenue agent who has testified in this case, show any letter or make any statement to the effect that either Mr. Fitch or I represented to the department that the International Life Insurance Company had done any of the work in finishing those floors? A. No."

The figure of \$584,881.66 is an estimated reproduction cost, new, of the International Building in 1913 based on the measurements of Mr. Wunderlich, which are 1,856,765 cubic feet, and an estimated cost of $31\frac{1}{2}$ ¢ per cubic foot. I am aware of the fact that there is testimony in this case that the building was constructed in 1906 and completed in 1907, with the exception of finishing the top 11 floors, heating plant, and a fifth elevator, and that the cost was \$375,000.00.

Q. Yes. How do you reconcile that figure of \$575,000.00 in 1907, with the top eleven floors uncompleted, and a completed building in 1913, with a cost of \$584,000.00, when costs were higher in 1913?

A. I did not know costs were higher. As a matter of fact, costs were, if anything, lower by one-third than they were in 1907.

[fol. 132] Q. You think that—is that it?

A. The construction index figures of the different contracting companies and appraisal companies, as I said, go back to 1913, with the exception of two that I took, that one is the American Appraisal Company and the other on an Engineering New Record, so both of those go back into the 1900—into the 1890s. In the Engineering News Record index, the 1907 construction is exactly the same as 1913, and in the American Appraisal Company's index, it is one per cent higher in 1907 than it was in 1913. It dropped down between times, but it was higher in—high in 1907.

Q. Yes. So you completed the building, Mr. Ruggles, in

1913, with all seventeen floors completed, at a cost of \$584,881, as against a building completed in 1907, with the top eleven floors unfinished, at a cost of \$575,000.00?

A. I say that is what it would cost. I don't know how much—."

Hoskold's Formula speaks of two methods used to discount future equal periodic payments of income to present worth. It separates these future payments into principal and interest. It is used to determine the lump sum cost of a unit which is to be paid in the future in payments which consist of principal and interest. It is used to determine the number and amounts of future payments necessary to amortize a loan or a debt. It is used to estimate the value of real estate investments or interests in real estate. It is based upon a fixed annual rate. Whoever used Hoskold's Formula did it on the assumption of an average annual income of \$22,000. That is customary in appraisal practice.

"Q. Can you tell me why they used an average income of \$22,000.00 for the forty-four years, instead of using the actual income of the property that was in their files, and averaging them? A. I couldn't tell you that.

Q. You can not answer that question?

A. No. I could tell you about the forty-four years. You did not mean that.

Q. Well, that is the basis on which it was. I don't think there is now any difference between the petitioner in this [fol. 133] case and the government on the life of the building. At the time that I had the conference with you, there was a considerable difference, wasn't there?

A. I believe so.

Q. In fact, you valued the building at that time on the basis of the life of the lease, didn't you? A. No, not I.

Q. Well, the government did.

A. Yes. That was after that, though.

Q. Yes. And I told you that we would not stand for it, didn't I?

A. No, you didn't tell me, because you and I never talked about it.

Q. And I told you, if the government tried to value this building on this life of the lease and issued a letter of deficiency on it, we would have to take it to the [Tas] Court, didn't I?

A. No. That came into the picture long after you and I discussed the case, Mr. Frank.

Q. Well, as a matter of fact, don't you know that the case went to the Tax Court because the government valued this building and placed its valuation for the life of the lease for depreciation purposes?

A. I found that out after I came out here."

At the time I had the conference in Washington with Mr. Frank on behalf of the taxpayer, he contended for a valuation of \$860,000, and the affidavit that was furnished us by George Black of the James Black Contracting Company, who built the building in 1906-07, stating that it had cost \$575,000, exclusive of the finishing of the top 11 floors, the heating plant and the fifth elevator, was before me. The affidavit further stated that the cost of a similar building in 1913 would be 34¢ per cubic foot.

At that time we had before us the affidavit of Mr. Boyle, stating when the building was constructed and what it cost, exactly as Mr. Black's affidavit. We also had before us the affidavit of Mr. Farish, who testified yesterday. We also had before us a letter from the Department of Public Safety of the City of St. Louis, showing the building permit and estimating cost at \$550,000. I have never [fol. 134] constructed a building, nor paid for the construction of a building. I have never bought or sold an office building. My testimony is based on the study of costs of office buildings all over the nation, not based on my own experience in building.

Questions by the Court:

"Q. Would it be fair to say that this figure that you have given of thirty-one cents per cubic foot was arrived at by taking all of the buildings in the city for a certain year and then averaging them? A. Oh, no. No.

Q. How do they arrive at the figure, thirty-one cents?

A. Well, after an appraiser has had enough experience, he can determine by inspection of a building whether it is a 50-cent building, or a 35-cent building, or a 70-cent building or a 40-cent building.

Q. You think that is the way this figure of thirty-one cents was reached?

A. Yes. Yes. Now, that is the way the 70-cent figure was reached. I arrived at the 70-cent figure from my own

experience, then I reduced it to $31\frac{1}{2}$ by the construction cost index on the others.

Q. Well, construction cost index, could they not have been arrived at by taking the total building in the City of St. Louis? A. Well, they would.

Q. And the total cost, and divide the cubic feet into the cost, and the result would have represented the average cost?

A. The average cost of the construction of buildings, yes.

Q. And is that the way, in your opinion, this figure of thirty-one cents per cubic foot was arrived at?

A. If I understand you right, yes.

Q. Well, what I am reaching for here is, under the experience of the builders, this takes the lowest cost as well as the highest cost? A. That is right.

Q. For some reason one building may have been in the high bracket, quicksand, for instance, that they might run into in putting in a foundation?

A. No. That would not—any abnormal cost would probably be kept out of things of that kind, because it is a [fol. 135] normal value that is sought in the studies of this kind.

Q. Well, how else could they reach an average or a normal value than to take the total building for a year, the cost of it, take the total cubic feet for that year, and divide them into the cost, how else could they find normal?

A. I probably should not have said that they don't do that, because I am not sure; but I should think they would, because it is a normal figure that is being sought.

Q. Well, how else could they reach a normal or an average?

It is in an average building cost, isn't it? Proceed."

The figures that I based my estimate on was a Fruin-Colnon study which was made for St. Louis and St. Louis vicinity. Some of the totals are based on an average of all cities.

"Q. Mr. Ruggles, the figures that you say you have based your estimates on are figures that had been gathered from hearings, that are based on averages all over the United States for those things, aren't they?

A. Some of these totals are based on averages of all cities. That one I used was a Fruin-Colnon study, which was made for St. Louis and St. Louis vicinity.

Q. Would you say that that is a more reliable gauge than the affidavit of the man who built the building and told exactly how much it cost per foot to construct—Mr. Black—of the building itself?

A. I would say that if I were estimating the cost new in 1913. I would use the figures that I used.

Q. Will you turn to Mr. Black's affidavit in your file there, please? How much does he say it would cost per cubic foot to construct the building in 1913, 32?

A. Thirty-four cents.

Q. Now, he was in business here in St. Louis, wasn't he?

A. I think so.

Q. And he should be in a position to know what building costs are in his own town, where he had built buildings, many buildings, isn't that true?

A. He would be in a position to have an opinion, yes.

Q. Yes. A. A very good opinion.

[fol. 136] Q. Do you still say now that your 31½ cents is a better figure— A. (Interrupting) That is my figure, sir.

Q. Then that is all; no, just one question. The judge asked for an average of figures for the years 1913 to 1949.

A. Yes, sir, that is the judge's question, I believe, not yours.

The Court: Well, I will let either one of you adopt it if you wish. I am just curious. It appears from the figures that have been furnished to me that the average net income from 1913 to 1949 was \$31,779.43. And I presume, on your six per cent rule-of-thumb, that the percentage that represents above net income of \$24,000.00, upon which you based your figure, would increase the valuation correspondingly.

A. If that were used as a basis for valuation.

The Court: I have the figure here that the net income during 1924 was \$26,000.00. Is that an error?

Mr. Hyder: No sir, that is an error. \$24,405.00.

Mr. Frank: In that table.

Mr. Nickman: It appears in Table 1; sir, page 11.

The Court: It is twenty-four thousand?

Mr. Nickman: \$24,000.00, in round figures.

The Court: Not quite a third more than the year 1914 for the average, 1913 to 1949.

The Witness: May I say something?

The Court: You may.

The Witness: The significant thing about the rentals from the property—about the income from the property—would be the fluctuations of the net income over the period of years. The pattern of rentals in the International Building is just about the same as all of the office buildings in the country over that period of years. Low rentals up to the time that the wartime boom started in the early '20s, up to the end of the '20s, end of the '30s, when it dropped down to a relatively low figure, then climbing slowly again into the late '40s.

The Court: I don't have the average for 1930 to 1949, but if you deducted the average from 1920 to 1949, it is even higher. \$33,873.00.

A. Have the benefit of all this thirty odd years.

The Court: Well, do you think—I don't say it critically [fol. 137]—but do you think it is fair to the taxpayer when you are arriving at the valuation on income, to take the minimum? A. Why—

The Court: Was there any year when the net income was less than \$20,000.00 a year?

A. As I understand it, net income from 1915 up to 1920 was less than \$20,000.00 a year.

The Court: I believe it was \$18,874.74.

A. It is customary, in trying to appraise real estate from income, to consider the net income for five prior years, and five—that is but an average valuation, if it was in any manner usable.

Questions by the Court:

Q. Let me ask you this, as an expert: do you and other men in your field, looking into the future, think rents are going to come down or continue up, or stay stable?

A. I think they are going up.

Q. That is pretty generally the consensus of opinion in the industry, isn't it, and among experts?

A. The costs are going up, and you can not build unless you have rentals to justify the cost. There may be controls under construction that has already been made.

Q. But when you go to figure the average income which has been used in arriving at the value of this building, no increase in income has been recognized, has it?

A. Well, this is the point in that connection, your Honor: in 1913, there was no information.

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Q. You mean when you arrived at these figures, or your department did, they tried to put themselves in the position of one back in 1913? A. Yes, sir.

Q. Well, if that is the case, don't you think they would have looked at those top eleven floors, and said, "Now, we are only getting twenty-four thousand this year, but we are going to finish those top eleven floors some of these days and then we will have some more rent"?

A. I have never known whether the top eleven floors [fol. 138] were finished or what number of them were finished, if any of them. That is the information I couldn't get. It is likely that they were not, and that the rental condition at that time did not warrant finishing. There were two other big buildings coming up just at that time, in 1913; one was the Railway Exchange Building, one of the largest buildings in town, and it was raiding the other office buildings at that time; it took the Missouri Pacific, it took the Wabash, and it took the Cotton Belt, I believe, out of the buildings [were] were in at that time, at low rentals, in order to fill that building. That could not help but have a very serious effect on all existing office buildings, and it is a question in my mind—and the Boatmen's Building was completed about that time. It is a question in my mind whether the conditions warranted finishing, and if it was not all finished at that time."

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Mr. Frank: I have a computation that Mr. Kessler just gave me, based on the years 1914 to 1949, inclusive, of an average annual return of \$30,625.00.

The Court: Well, that is in the record. Later, if either party finds it an error, you can correct it in your briefs."

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Q. Assuming that the average rental and average net for the years of 1914 to 1949, being 36 years, was \$50,625.00, can you tell me, according to your Hoskold's Formula, what the approximate value of the building would be in the year 1913?

A. It would be the same as I have told you, because the valuation would be predicated on what was known at that time and not what had happened thirty years later.

Q. I see, so you looked backward just two or three, or four years, when using the Hoskold's Formula, in computing the value of the building, instead of looking backward from the date of the return back to 1914, isn't that correct? A. That is right, yes."

Redirect Examination.

I am not in the habit of incorporating matters in my [fol. 139] memoranda which to my knowledge are incorrect. This memorandum of mine is based on notes that I took in the course of the conference. I do not have the notes here. There is nothing in my files showing exactly when the building was finished, who finished it, the price, who bore the cost and how much was paid to finish it. That is the reason why we have never been able to make a satisfactory computation of value because we did not have the facts.

ETHEL A. GIBLIN, testifying on behalf of the defendant, stated: I am Secretary and Treasurer of the Missouri Lincoln Trust Company, and I am also secretary in the law office of Carter, Bull & McNulty. I have been in that position since 1919. I am the custodian of the files of the Missouri Lincoln Trust Company. I was appointed Assistant Secretary and Treasurer of Missouri Lincoln Trust Company in 1922 and since that time have had access to the books and records. I am in charge of them at this time. I have a file containing correspondence relating to International Building Company.

I have a copy of a letter from Mr. Hayward, who was, the then Secretary of the Missouri Lincoln Trust Com-

pany to the Commissioner of Internal Revenue dated September 10, 1917. It is as follows:

"A. September 10, 1917.

Honorable Commissioner of Internal Revenue, Treasury Department, Washington, D. C., attention of Honorable G. B. Fletcher. In re: I-CB First Missouri Capital Stock Tax. Dear Sir: Yours of the 7th received.

"As the dispute between us concerns only the question of our paying only a small additional tax to the government, which we are quite willing to do, we accept your ruling without further question. It is, however, proper to say that when we organized International Building Company we were forced to make the capital what we did in order to float bonds in the amount stated, that we offer the stock at that time at \$18.00 a share, which is 36 per cent of par, and still hold 90 per cent of the original stock, which we offered at the same price. If, therefore, you can convince any of your wealthy friends that our stock is worth the [fol. 140] amount stated, they can make a quarter of a million dollars by the investment of \$100,000.00 at any time upon accepting your offer.

Very truly yours, J. K. Treasurer."

I have here a copy of the capital stock tax return for the year 1917 and it sets out that the International Building Company began business May 1, 1913, and then it lists the total par value of its capital stock as \$300,000.00; amount of surplus, none; amount of undivided profits, none. Then it says common stock, 6000 shares; fair value of outstanding capital stock for preceding fiscal year ending June 30, 1917, \$108,000.00.

Cross-Examination.

I have the letter of the Bureau of Internal Revenue dated September 7, 1917, which was referred to in the letter from Mr. Hayward that I just read. It is as follows:

"Treasury Department, Washington, D. C., September 7, 1917. Re: Capital Stock Tax, International Building Company, 722 Chestnut Street, St. Louis, Missouri.

"Receipt is acknowledged of your recent communication explaining the fair value of stock of your company estimated on the return of capital stock tax, Form 707, filed with the Collector of Internal Revenue, First District of Missouri, on January 17, 1917, at \$18.00 per share.

"In reply, you are advised that the statements contained in your letter have been carefully considered, but in view of the value indicated by your statement of assets and liabilities of June 30, 1916, this office is of the opinion that the fair value of stock is at least \$348,607.00. An assessment of additional capital stock tax in the amount of \$60.00 will therefore be made against the company in the next adjustment list. The collector will forward you a bill for the tax due and payment should be made direct to him within ten days after the receipt thereof.

"Respectfully, G. E. Fletcher, Deputy Commissioner."

[fol. 141]

Redirect Examination.

"There is in the file a letter from Missouri Lincoln Trust Company to the Collector of Revenue of Missouri, dated November 28, 1917,

"November 28, 1917. Honorable George H. Moore, Internal Revenue Collector, First District of Missouri, St. Louis, Missouri. Dear Sir:

"Herewith we hand you capital stock tax report of the Missouri Lincoln Trust Company and the International Building Company for the year ending last June. These have not been previously sent you, because your office has heretofore kindly sent us copies of blanks when desiring reports, and last month's blanks have not previously been received.

"You ask for no report of the Lincoln Trust Company and I assume that is because our last report showed it went out of business over ten years ago, and while having an organization capital, its capital assets are all in the hands of Missouri Lincoln Trust Company and are included in the assets of that company. The organization of the Lincoln Trust Company is preserved simply because of certain trust obligations assumed, since they are still existing.

"Representatives of your department in Washington take exceptions to our report concerning International Building Company, but we can not change our report as long as we make oath to it from the existing facts. That company was capitalized for \$300,000.00 in order that we might be able to float a bond issue in like amount on this building, as is necessary under the laws of Missouri. The Missouri Lincoln Trust Company owned all of the capital stock and offered it for sale at \$18.00 a share. About 10 per cent of it was sold and the rest of it is still in our treasury for sale at this price.

"You will notice that the profit report made on account of this building showed a substantial loss the first year and small percentage of profit the second [fol. 142] year, with decreasing net profit each year thereafter. These profits are more than consumed by meeting the obligations of our bond issue. Of course, our books are open to your inspection at any time.

"Yours truly,

"MISSOURI-LINCOLN TRUST COMPANY,
"Treasurer."

There is another letter in the file dated August 22, 1917, from the Missouri Lincoln Trust Company, addressed to the Commissioner of Internal Revenue, which has a pencil notation on it, "International Building Company," the last paragraph thereof reads:

"The principal taxes are levied by our state and county and are not payable until the last of the year.

They amount to \$13,300.00. Our fiscal year closes with the calendar year, and this statement taken in the middle of the year shows an apparent profit, although, as a matter of fact, it does not show any reserve for taxes, which fund, with a small additional amount, was used, as you will notice, in redeeming bonds. The result of this showed at the end of last year a net profit of \$5,110.43, which necessitated the company's borrowing \$2,025.33 in order to pay its taxes.

"Any further information which you desire will be cheerfully provided."

* * * * *

"Miss Giblin, you are familiar with the details of records and so on of the Missouri Lincoln Trust, in connection with your duties. Would you know, as a result of your experience through examining the record and so on, being custodian of them and having read through the material that they contain, could you tell us about how many stockholders the Missouri Lincoln Trust Company had?"

Mr. Frank: I object to that, because I think the records of the Missouri Lincoln Trust Company are the best evidence.

The Court: Well, I think that objection is good, but what has it got to do with the issues here?

Mr. Nickman: Well, I will state to the Court exactly what the government's position is on this issue.

The Court: No, on this question.

[fol. 143] Mr. Nickman: On this question. The best evidence of the value or the best evidence of the taxpayer's basis in this case is the consideration paid, the market value of that consideration. It was not cash. It was securities. And we are trying to ascertain whether or not there was not a public offering of that stock, and we have evidence that we are prepared to offer in these exhibits to show that it was a public offer, and this witness's testimony is important to show that the stock was offered to a substantially representative group of the public.

The Court: You mean you want to show by this witness how many stockholders there were, and the stock was offered to the stockholders, and that was a substantial representation to the public?

Mr. Nickman: Yes, sir.

The Court: Is that your purpose?

Mr. Nickman: Yes, your Honor.

Mr. Frank: We object. That is a limited group of the public.

The Court: Well, I think the stockholders' books are the best evidence, unless you can account for their absence.

Q. Miss Giblin, do you know whether there are—there is available any books showing the number of stockholders that the Missouri Line In Trust Company had in 1913?

A. Well, no sir, I would say so, because as the stock is transferred, that is taken out and put into another book, and my knowledge, as far as I know, there has always been—well, I cannot answer the question, however, can I?

Q. Miss Giblin, what is the per cent—

The Court: Did you send out stockholders' notices?

A. Did I then? Not then.

The Court: Well, at any time?

A. Oh, I have sent them out, yes, in a number of years after 1922.

The Court: Do you know whether or not you have stockholders' change?

A. Very, very little, because of the condition of the company, and for years no one ever had stock transferred because—on account of the company being in liquidation.

[fol. 144] The Court: Where did you get your list of stockholders, to send out the notices and announcements?

A. Well, at the present time we have what we call a master list—

The Court: Does that company still operate?

A. Oh yes, well, we are operating as the owner, as estate. We distribute two dividends a year of an oil royalty, and we have continued to hold stockholders' meetings, and we

send out notices every year, of course, of a stockholders meeting.

Mr. Frank: May I ask you—I don't want to unduly delay this case. I think, if the witness can tell us, if she has any idea how many stockholders there were of the Missouri Lincoln Trust Company; in 1913, that might help us, and I would permit her to answer that question. I don't want to entail delay unnecessarily.

The Court: Very well, can you tell him?

A. Well, I would say there were approximately 700, which have varied, maybe a little under, maybe a little more, but that was the original stockholders at that time, and by transfer of the estate owners in Missouri, it varied, but it ran around 700.

Q. That was in 1913, Miss Giblin?

A. Well, I can say it was from the time I had it, and I understood it was practically the same.

Q. Yes.

A. It was only recently we have had any amount of transfers due to the fact that this royalty has been discovered, but up to that time had remained rather dormant."

Recross Examination.

"Miss Giblin, in your file there, the government letter and your letter in reply refers to a balance sheet of assets, stock balance and profit and loss statement. Have you got that in your file there, that was attached to that letter, or in response to that letter. That is the 1917 letter.

A. I have a supplemental statement which he furnished after the letters went back and forth, Mr. Hayward contending that it was a worthy claim, and his statement thereto is attached, and the government asked for [fol. 145] a supplemental statement, and then he furnished the supplemental statement, still contending, however, that he did not believe it was worth it, which letter has already been read into the record.

Q. Yes.

A. Is it all right for me to give it? I don't know the procedure.

Q. I am referring to the statement in which the government states that we issued a statement furnished for capi-

tal stock purposes which indicated a valuation of \$348,000. You don't know for what year this was, do you? It does not call for the year.

A. Yes, 1917, at the top it is printed.

Q. I see. This statement, as part of it, shows its assets, many different assets, \$600,000.00, and real estate, building and machinery of the International Building Company, does it not? A. That is correct, with the statement of tax.

The Court: What date is that?

Mr. Frank: 1917.

The Witness: For taxpayer's period ending June 30, 1918, contains balance sheet as of December 31, 1917."

Redirect Examination.

The letter dated August 22, 1917 from the Missouri Lincoln Trust Company to the Commissioner of Internal Revenue has a paragraph preceding the paragraph that I read a while ago. It reads:

"When the books were closed on December 31, 1913, operations for that year showed a net loss of \$3,289.93. In 1914, this loss was overcome and the company showed a net balance of \$3,060.88. Under the terms of the mortgage securing these bonds, it is necessary to call in and pay off bonds in the amount of \$8,000.00 each year. 1915 showed a net profit of \$5,803.36, which, with the net profit of the preceding years, was used in redeeming \$8,000 worth of bonds. Leaving a balance to the credit of the profit of \$864.24, January 1, 1916. These bonds matured on the 1st day of May, at which time, in 1916, an additional \$8,000.00 worth of bonds were redeemed, leaving the balance as shown."

[fol. 146] MALCOLM I. FRANK was asked to take the stand to testify on behalf of the defendant:

I am a lawyer, and I began to assist Mr. Fitch in representing the company in either 1937 or 1938. The plaintiff was not directly my client. Mr. Fitch had asked me to

go to Washington on behalf of plaintiff. I do not recall the exact dates. Mr. Ruggles mentioned them yesterday in his testimony. I have represented Henri Chouteau personally in recent years. I recall the occasion last summer when Mr. Hyder, who is now in court, representing the Bureau of Internal Revenue called upon me and requested an opportunity to inspect the books of account of the taxpayer company.

I told him that I had been advised that the early books of the company could not be located. Mr. Hyder was in my office on two occasions and I believe I called Mr. Chouteau on one of those occasions. The books of account, except the early books, have always been available to the government so far as I know. In my conference with you shortly after your arrival here, Mr. Nickman, you asked to see the books of the company and issued a subpoena against me personally and against International Building Company to bring those books into court. I spoke to Mr. Chouteau about it, and he said he had not seen the early books of the company in years. So far as I knew, he did not know where they were.

Last Monday, if I am not mistaken, I called Mr. Chouteau to make another thorough search, to see if he could find the early books of the company, in response to that subpoena duces tecum. He found that book in some old cabinet or something, very dirty, and I immediately called you the next morning and told you it had been found, and you asked me to bring it up here, and I did, and another book that he found. This receipt was given me by the Chief Clerk for the United States District attorney, and shows that they were received November 11, 1950, at 11:45 a. m. That was put on there at your request. I do not know it to be a fact that those are the very books that Mr. Hyder asked for last summer. I presume they are. I have gone through the company's minute book to ascertain the facts fairly, but I have not done so recently.

I did not contact the custodian of records of the old Missouri Lincoln Trust Company, but about 10 or 11 years ago when the case of the 1933 income taxes arose, that is [Vol 147] the depreciation base—at that time I spent considerable time in trying to find out something about the

early history of the building. I had been informed that Mr. Frank Carter, an elderly lawyer here in town, had been active in the Missouri Lincoln Trust Company and had organized the International Building Company.

I went to see Mr. Carter, who was not feeling well, and told me that everything that he knew was in the knowledge of a Miss Ball, and I was unable to get much information from him, but he told me that Miss Ball would mail me the early history of the company, so far as she knew, and subsequently, if my memory serves me right, a few days later, Miss Ball did give me a little something, which did not shed very much light on it.

I also went down to the City Hall. At that time a Mr. Chadsey was Building Commissioner and whatever their records showed, I mailed to the government.

"Q. In connection with your examination yesterday of Mr. Ruggles, I want to be sure I understand correctly your position. Do you deny that you made the statement that Mr. Ruggles stated in his memorandum that the International Life Insurance Company had finished the upper eleven floors, in lieu of rent?

A. Mr. Nickman, to my best knowledge, I never made such a statement, because I had nothing on which, so far as I can recall at this time, anything to base that on. I had previously, after going through my files, when you asked me to be ready to produce any letters back and forth pertaining to the values, I went through all the files I had and looked them over again, and in there I found a letter from the government in which they stated that some agent had reported that there was some resume or something like that—I forget—that the International Life Insurance Company had completed those floors. In my conference with Mr. Ruggles, in talking about the various phases of the case, I told him, I said: 'One of your letters says that the International Life Insurance Company may have completed the top eleven floors.' I said, 'I have checked into that with the International Life Insurance Company and, so far as I can ascertain, I have not been able to verify anything like that.' Now, that is my recollection of it at this time."

[fol. 148] FREDERICK B. HYDER, testifying on behalf of defendant, stated: I am the Principal Engineer in the office of the Chief Counsel of Internal Revenue. That is an A-grade, a superior grade of engineer, the official designation is Principal Engineer, but, for purposes of reports we use the title "Valuation Engineer" and my experience with the Bureau has been almost entirely upon valuation work.

My duties are to assist in the analysis and preparation of cases in litigation in taxes or to give assistance to the attorneys of the bureau of Internal Revenue or Department of Justice when requested to do so on technical questions of any kind.

I had one year college at University of Colorado and four years at Colorado School of Mines, graduated with degree of engineer of mines in 1903. In 1930, I received the degree of bachelor of commercial science at Western Institute of Accountancy at San Francisco; in 1930 I was admitted as CPA by examination in California, and retained that certificate for as long as I saw fit to pay the annual renewal fee.

I have had 47 years experience in the application of engineering and accounting to industry; I have had 11 years' service, in government service, of which one year was in the Bureau of Mines as metal mining engineer, as just the engineer for rivers and harbors, one and a half years in the income tax unit as assistant chief of metals valuation section; three and a half years in the highway section, field division, and approximately six years in the office of the chief counsel, and in addition to the government service, I appraised, as a consulting engineer, for about fifteen years. Prior to that, I had approximately ten years of private employment, ranging from engineer to geologist, and superintendent and manager of mining companies, and prior to that, [approximately] ten years of miscellaneous engineering work.

I have had approximately 7 years' work in government service in valuation work, and then I would say that for 10 years my private practice involved as a vital element valuation problems. My present work in the Bureau frequently involves valuation of the securities of corporations.

In connection with my official employment with the gov-

ernment, I am frequently called upon to support the findings of the Commissioner of Internal Revenue when litigation arises.

[fol. 149] My duty is to analyze the cases presented and to assist the attorneys in getting an understanding of them and in preparation for trial, if that is entailed, but our method is to give an independent review of the case, and we are accorded the utmost latitude in arriving at our conclusions and our recommendations to counsel. I have had cases where there were as many as four issues where I found that the taxpayer was right and the commissioner was wrong, and so reported, and in the end the taxpayer prevailed. In, I would say in more than half the cases in the course of our investigations we find that neither the taxpayer nor the commissioner is right, that the approximate truth or correct values are somewhere between the two, and in most of those cases we arrange compromises.

I have studied the stipulation of facts between counsel in this case and I am familiar with its contents and I participated in its formulation. On the basis of the facts in this stipulation and from my own knowledge and experience I have formed an opinion as to the fair market value as of May, 1913, of the plaintiff's stock, and of the plaintiff's bonds. I would say the value of stock as of May 1, 1913, did not exceed \$108,000. This exhibit "U" is evidently an offer made by the Missouri Lincoln Trust Company to its stockholders on May 20, 1913, which was referred to in the stipulation. It offered the capital stock of the International Building Company at \$18.00 per share, which would make a value of \$108,000 for the total issue.

[fol. 150]

Exhibit U.

Missouri-Lincoln Trust Company.
421 International Life Building.

St. Louis, May 20th, 1913.

To the Stockholders of the Missouri-Lincoln Trust Company:

Under instruction of your Board of Directors there has been organized the International Building Company, to which has been conveyed the leasehold and the building

thereon at the Southeast corner of Eighth and Chestnut Streets, heretofore known as the Liggett Building.

The International Building Company has a capital of \$300,000 divided into six thousand shares of the par value of \$50.00 each. It also has a bonded indebtedness of \$300,000 secured by a first deed of trust upon the leasehold and building mentioned above. There are 152 bonds of \$1,000 each, 96 of \$500 each, and 1,000 of \$100 each. The first 152 bonds mature at the rate of eight each year, beginning with May 1st, 1916. All the other bonds mature May 1st, 1938. All bonds bear 6 per cent interest, payable semi-annually, on the first day of May and November in each year. These bonds may be redeemed at any interest date, after thirty days' notice by publication, by paying a premium of 1 per cent in addition to the principal and accrued interest.

The International Life Insurance Company has purchased the first 150 bonds, amounting to \$150,000, and has leased for ten years the entire sixteenth floor of our building at an average annual rental of \$5,650, about \$1.00 per square foot per year; in consideration of which the name of the building has been changed to the International Life Building.

Under existing leases to tenants the building is now producing a net annual income, after meeting all liabilities on account of the bonds, sufficient to pay an ample dividend on the stock.

The capital stock of the Building Company and the unsold \$150,000 of bonds are now offered exclusively to the stockholders of the Missouri-Lincoln Trust Company at \$18.00 per share for the stock and par and accrued interest for the bonds. Each stockholder is entitled to subscribe for one-fifth more shares of building stock than the number of shares which he now holds of Missouri-Lincoln stock; that is, if he owns five shares of Missouri-Lincoln stock he may purchase six shares of building stock, costing him \$108.00. He should also purchase bonds to the extent of 30 per cent of the face value of his Missouri-Lincoln stock; that is, if he owns five shares of Missouri-Lincoln stock, he should buy \$150.00 worth of bonds. Considering the low price at which the stock is offered, it

seems impracticable to offer fractional shares of building stock, and subscribers are requested to ask only for one or more full shares; but as the present interest of many of our stockholders is so small that no one of them need buy even the smallest bond, subscriptions will be taken for part of a bond. The Missouri-Lincoln Trust Company's trust department will receive these fractional subscriptions, purchase and hold the requisite bonds, against which it will issue to such stockholders transferable certificates of interest; collect coupons when due, remit the same, and all without charge. This makes it practicable for each stockholder to buy his proportionate interest in the bonds.

It would seem unnecessary to call your attention to the wisdom of buying your part of this stock and these bonds, because even under present conditions the stock can be made to pay a splendid return on its cost. Your proportionate part is indicated on the enclosed subscription blank, which please sign and return if you so desire. Those who pay all cash will save the payment of interest on deferred payments. If you do not care to subscribe, please so notify us that we may surely know your pleasure in the premises.

We beg to advise you that we hope to secure an underwriting of all the stock and unsold bonds not taken by you previous to the 16th of June; therefore please let us hear from you not later than noon of that day, in order that you may not fail to secure such allotment as you desire, and that we may know just how much remains to be underwritten.

Permit us to urge you to send in your old certificates of Missouri-Lincoln stock to be exchanged for new ones issued on the present basis of capitalization.

Respectfully

W. F. CARTER,

President.

[fol. 151] I was present and heard Miss Giblin of the Missouri Lincoln Trust Company testify. Something she said during the course of the trial helped to enter into

my opinion. She said that Mr. Hayward, the Secretary and Treasurer of the Company, International Building Company, and also of the Missouri Lincoln Trust Company, at that time said that the unsold balance of the shares were for sale at the same price to anyone that wanted them.

This is Exhibit "S"—it is a copy of a rider attached to the 1917 capital stock tax return of the International Building Company, and I considered that in connection with the formulation of my opinion.

[fol. 152]

Exhibit S.

(Rider attached to 1917 Capital Stock Tax Return of International Building Company)

Statement.

In September, 1907, the Missouri-Lincoln Trust Company went into voluntary liquidation. Previous thereto it had under-written an issue of bonds secured by the office building known as the "Liggett Building", and in order to protect itself it was necessary for the Trust Company to acquire as well the ownership of the equity in that building. The bonds in question cost at their face value \$425,000.00, and in addition the equity cost somewhat in excess of \$220,000.00.

For a number of years the Trust Company sought to dispose of the building but was unable to do so on any satisfactory terms. The amount that was invested in the equity was charged to Profit & Loss, and the investment was held practically at the cost of the bonds. Local financial conditions made it impossible to sell the bonds, and as the Company was still liquidating, and all available funds were desired, it seemed necessary to reduce the bond issue appreciable in amount and to provide for a larger interest. The old bonds paid 5% interest and the new bonds could not be sold bearing less than 6% interest. Therefore to clear the title and provide for such a bond issue as might be marketed, the Trust Company caused the "International Building Company" to be organized and transferred the title to the Building to such new

Company. A new bond issue in the amount of \$300,000.00 at 6% was placed on the building; and as the International Life Insurance Company agreed to purchase a large number of these bonds, and to rent considerable space in the building for a term of years, the name of the building was changed to the "International Life Building".

As the Company was organized under the laws of the State of Missouri, and as the bond issue had been fixed at the amount stated, it was necessary that the capital stock of the Building Company should be not less than the face value of the bonds, as required by our law. This fixed the par value of the Building Company's stock at \$300,000.00. We did not then, and do not now, believe that it was worth that amount of money, and so the officers of the Trust Company were authorized to offer this stock to the Trust Company stockholders at 36¢ on the Dollar, at which price about Ten Per Cent of the stock was sold. The rest of the stock in the Building Company still belongs to the Trust Company, and none of it has paid any dividend since the Building Company was organized. Therefore, when certifying to the market value of the Building Company stock, it was not possible to state that value in excess of the price received from the small amount which has been sold.

Respectfully submitted,

• JAMES HAYWARD,
Secretary & Treasurer.

[fol. 153] There is a reference in the stipulation of facts to an entry of January 26, 1917.

"Q. Now you have stated that you have read the stipulation of facts and are familiar with the stipulation. There is reference in that stipulation to entry of January 26, 1917. In your expert opinion, what is the significance of that entry?

A. If it is permissible to say so, I saw all the original entries on the books of the Missouri Lincoln Trust Company, and it is quite evidently one of several items of stock that have been held for—

The Court: Several items of what?

A. Several items of stock, capital stock of corporations held by the Missouri Lincoln Trust Company, and these entries, including this one pertaining to the International Building Company stock, was in the nature of an inventory of those shares, put on the books at this date, but which was the closing date of a period for which a firm of certified public accountants was completing the examination. Apparently they had found that these—that none of these—of this list of stocks had been entered on the books, and they had caused the corporation to cure that defect before they completed their report and made their certificate. That was my inference from the nature of the entries.

The Court: Do you know whether listed under assets or liabilities?

A. Yes, sir, the assets of the company. And the same list appeared in that light in the report of the certified public accountants, Meyer, Mitchell and—

The Court: How many shares of the building company?

A. Five thousand, nine hundred ninety-two, if I recall correctly.

The Court: How was that?

A. Five thousand, nine hundred ninety-two. 5,592.

The Court: What value did that put on the shares?

A. Ninety-two thousand, same as indicated in this document, I believe. It was something like \$92,656.00. It is the amount stated in the stipulation.

The Court: Go ahead.

The Witness: \$92,656.00.

[fol. 154] Q. Mr. Hyder, in connection with formulating your judgment, have you used the sales of this stock as a criterion of value? A. I have.

Q. What other criteria may be used?

* * * * *

A. The book value is sometimes considered, but that is, well, is notorious—

The Court: The ruling is, you may state what you used in arriving at the value of this stock, that you placed at \$108,000.00. Now anything you used in arriving at that value, you may testify to.

Q. Mr. Hyder—

A. (Interrupting) Another—I might state that another thing I took into consideration an item stated in the stipulations that immediately after the receipt of this stock, I think it was about two weeks later, about May 14th, the vendor company entered this stock on its account at \$100,000.00 by crediting their stock account with that sum, May 14, 1913, by order of the board of directors, thus indicating the value which the vendor company set upon the stock immediately upon its receipt.

Questions by the Court:

Q. Who was the vendor company?

A. The Missouri Lincoln Trust Company, according to the stipulation.

Q. Who was the vendee company in this case?

A. The International Building Company.

Q. Were they selling the stock for International Building?

A. No, sir. No, sir. I say, immediately after the receipts of the stocks and bonds, which were the consideration for the transfer of this interest in the leasehold, the vendor company, Missouri Lincoln Trust Company, by order of its board of trustees, according to the stipulation, credited its bond account with \$300,000.00 on account of bonds of the taxpayer company and its stock account with \$100,000.00 on account of stock of the taxpayer company as evidenced by the minutes of the meeting of May 14, 1913, copy of which is attached as one of the exhibits. [fol. 155] Q. That account, \$108,000.00?

A. Yes, sir. Well, no, that would only make \$400,000.00. During this time, that stock on the accounting value in a trade would be \$108,000.00 stock. As a matter of fact, it is indicated in statements of Mr. Hayward in this Exhibit S, they had their doubts as to whether the stock was worth as much as they put on their books, and this entry to complete what information I have to offer for you—offer you—this \$92,656.00 is approximately—not exactly—not

actually—the balance that will remain from the hundred thousand dollars after the account has been properly adjusted for the sale of 434 shares, in accordance with the offer that was referred to before.

Another consideration which is always pertinent to establish the value of stock is its earnings and dividend-paying capacity. In that connection, I have made a tabulation—

Q. Is this the tabulation you are speaking about (indicating)? A. It is.

Q. Now, tell us what that is.

A. This is a tabulation which I have made from the tax returns for the years 1914 to 1919, both inclusive, of plaintiff's corporation, and I have checked the figures with the tax returns. The 1913 return is not available; the bureau apparently does not have it, but the net income for 1913, for the eight months of 1913, is stated on the 1914 return of the plaintiff, and I have used that also. So that this is the tabulation of the net income of the corporation for the first six years and eight months of its existence, of its operations and—

Mr. Frank: May I enter an objection?

A. (continuing) —the corresponding earnings available for dividends after deducting the income taxes paid.

The Court: Are you offering that as an exhibit?

Mr. Nickman: I just want to say this, your Honor; I am trying to save time and to help you. The returns in this case, to one who is not an experienced accountant, I take it are not self-illuminating to the Court. Mr. Hyder is an expert and has taken all these figures from the returns, to enable your Honor to see what these sales, if correlated, would show. We have this tabulation and we [fol. 156] would like, with counsel's permission, to have his accountant check it, if necessary, and offer it as a joint exhibit.

The Court: Well, you may offer it yourself, if you wish. I don't know whether the plaintiff wants to join with you.

Mr. Frank: I don't see the relevancy of it. Of course, I have not seen it. I don't see the relevancy of it, your Honor, but it is evidently an effort to—

The Court: Well, let's not argue it now.

Mr. Frank: No.

The Court: Are you offering this as an exhibit?

Mr. Nickman: The government will offer the exhibit.

Mr. Frank: I object to it, because it is an attempt to put the value of stock in 1913 by looking back to subsequent earnings and valuing it as to facts which could not have been known on that date.

The Court: Well, I will receive it for what it is worth. As government's Exhibit—have it marked.

Mr. Nickman: AA. (The said document was thereupon marked by the reporter as Defendant's Exhibit AA.)

[fol. 157]

(Defendant's Exhibit AA.)

FAB—11/10/50.

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International Building Company

Earnings Available for Dividends
May 1, 1913 to December 31, 1919

Computed from Data on Income Tax Returns

Income	1913	1914	1915	1916	1917	1918	1919
Rentals		\$98,038.55	\$94,814.25	\$93,423.41	\$89,951.84	\$91,027.38	\$107,050.36
Interest		226.58	304.02	168.52	140.59		115.49
Other		19.20					
Total Income		\$98,284.33	\$95,118.27	\$93,591.93	\$90,092.43	\$91,027.38	\$107,165.85
Ground Rent		20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00
Interest		18,000.00	18,000.00	17,416.80	17,040.00	16,122.34	17,890.73
Taxes		13,307.59	13,584.44	13,666.01	13,508.01	14,063.66	15,833.73
Labor, Wages, Etc. ...		16,109.14	15,849.43	18,099.14	24,391.87	21,176.25	18,828.63
Fuel, Light, Etc. ...		13,418.24	13,336.06	10,912.79	10,573.54	17,909.61	19,618.59
Repairs		3,566.25	2,685.49	3,654.05			
Insurance			400.00		2,244.40	1,861.76	1,712.39
Other Exp.		2,970.22	862.41		56.80		9,157.45
Manager Sal.		4,000.00	4,000.00	4,000.00	4,000.00	Inc. above	4,000.00
Other Office		562.08	597.08	732.71			
Total Exp.		\$91,933.52	\$89,314.91	\$88,481.50	\$91,814.62	\$91,133.62	\$107,041.52
Net Income	*(\$3,289.93)	6,350.81	5,803.36	5,110.43	*(1,722.19)	*(106.24)	124.33
Income Tax	None	None	56.03	102.21	None	None	None
Earnings Avail. for Dividends	*(\$3,289.93)	6,350.81	5,745.33	5,008.72	*(1,722.19)	*(106.24)	124.33

* Losses in parenthesis.

[fol. 158]

"Q. Well, it shows in the net income for 1913 a loss of \$3,289.93.

Net income in 1914 of \$6,350.81.

1915, \$5,803.36.

1916, a net income of \$5,110.43.

1917, a loss of \$1,722.19.

1918, a loss of \$106.24.

And in 1919, net income of \$124.33.

Income taxes were paid only in the years, 1915, in the amount of \$58.03, and in 1916, \$102.21. This left earnings available for the payment of dividends, net total of \$12,110.33 for the six years and eight months covered. This averaged \$1,815.64 per year. That would be 1.8 per cent return on a value of \$100,000.00. The minimum requirement for earnings to substantiate that value of stock would be six per cent.

Another way of putting it, this average earning was thirty cents per share, per year. If that were capitalized at six per cent, the value of the stock would be \$5.00. This tabulation shows a downward trend of earnings available for dividends and an utterly inadequate earning power of this stock to substantiate even a value of \$100,000.00, or \$16.67 per share.

One confirmation, further confirmation of this is, that according to the stipulations, on April 1st of the next year, 1920, all of this stock, 6,000 shares, was sold to R. Chouteau for \$82,000.00, which would be \$13.67 per share."

The fair market value of capital stock is not necessarily the same as the net value of its assets.

Cross-Examination.

I do not know of any sales of stock outside of the sale of stock by the Missouri Lincoln Trust Company to its own stockholders that took place, until 1920, when Mr. Chouteau bought the stock from the Missouri Lincoln Trust Company. Except I know from the Missouri Lincoln books that there was a block of 17 shares sold in 1919 at [fol. 159] the same price. The 434 shares that were sold in 1913 were sold under the offering made under the date of—

May 20, 1913, which was the date shown on Exhibit "S". It is stipulated that the subscriptions were closed by the board of directors of Missouri Lincoln Trust Company on October 31, 1913, so the sales were made sometime between May 20 and October 31. The books of the Missouri Lincoln Trust Company that I have seen do not show the actual date when the stock holders subscribed to the stock. The stock book of the International Building Company shows the issuance of certificates for these 434 shares chiefly on November 1, but some 33 of them were dated November 5 or November 7, 1913, and they were issued to stockholders of the Missouri Lincoln Trust Company. I valued the stock at more than \$108,000 as of May 1, 1913. Personally, I think it was less. I heard Miss Giblin yesterday read into the record a letter from the Treasury Department, Bureau of Internal Revenue, which stated that the Commissioner's valuation of that stock was \$348,607.

"Q. Are you trying to establish one value of the stock for depreciation purposes and another value for capital stock tax purposes?

A. No, but unfortunately the commissioner of internal revenue is the nominal head of a large organization which enforces, or administers, I should say, a number of different taxes, and in effect he has different organizations to administer these various taxes. This is one of those occasions where the right hand did not know what the left hand was doing, and the value for capital stock purposes is fixed absolutely independently of any valuation for income tax purposes, and in that case was very evidently—was stated by the letter of the commissioner to be based upon the balance sheet that was submitted.

Q. And that balance sheet showed the financial condition of that company, didn't it?

A. On that balance showed value of the company at \$600,000.00.

Q. Yes. A. The par value of securities issued under it.

Q. So your testimony in effect overrules the commissioner's ruling at that time as to value and puts the value of the shares of stock for depreciation purposes on the building at one figure and still leaves the same commissioner's valuation for a different tax at an entirely much larger figure doesn't it?

A. The two values were for purposes of two different taxes.

Q. Uh-huh. A. And were not correlated at all.

Q. But it was the valuation of some accountant, wasn't it?"

The \$300,000 mortgage bonds were sold at par and I would accept them at face value for the purposes of valuation. The date of entry on the books of the Missouri Lincoln Trust Company of the 5592 shares, \$92,656.00, was January 26, 1917. There was no entry on the books like that in 1913.

"Q. Now, you also said that the minutes of the Missouri Lincoln Trust Company showed that they were crediting their stock account with \$100,000.00?

A. That is right.

Q. Is it not a fact that when institutions put their assets on the books, they debit them for their value, and not credit them, and they credit them when they are sold?

A. There must have been a balancing entry.

Q. Pardon me. Isn't that a fact? A. That is right.

Q. Well, then, the so-called "entry" on the books of the Missouri Lincoln Trust Company you would say was an incorrect entry then, wasn't it?

A. No, I would not say it was incorrect.

Q. Well, how can you set it down on the books of a company by crediting something? You have got to debit them, don't you, sir?

A. There was a corresponding—there must have been a corresponding debit.

Q. You showed that photostat of that entry to me when we were getting up the stipulation of facts, did you not?

A. This one of January 26, 1917?

Q. No. The crediting of the \$100,000.00. You had two things, if I recall, that you showed to me at that time, Mr. Hyder; one was some minutes of the Missouri Lincoln Trust Company, and one was a photostat of the books of the Missouri Lincoln Trust Company? A. That is right.

[fol. 161] Q. Wherein one stated that they were crediting the \$100,000.00 and the photostat of the book entries was to the same effect. Am I right or am I wrong in that?

A. I don't quite understand the question.

Q. You made some photostats of some of the books of

account of the Missouri Lincoln Trust Company and had them there at the time of the conference last week, did you not? A. We had them under inspection.

Q. Yes. A. I can not say that I had them there.

Q. Well, you showed me some.

.

Q. You admit that when a company sets up its assets and values, then they debit the account?

A. That is very true, but I think not—

Q. (Interrupting) But it was not so done in this case?

A. I understand your question now, and I think I can answer it, clear it up for you. The board of directors ordered this—the value of the stock received to be credited to their stock account, \$100,000.00. I have not seen a ledger in which that entry was made, but it would appear from this entry in the journal, of which you were shown a photostat, that there was no corresponding entry on the asset side of the ledger, and it was being remedied by this inventory entry of the remaining stock in 1917. The books of the company, I would have to say in explanation, were conducted on a very—in a very careless manner, or at least so you would consider these days, and as many such books, including your own, were conducted.

Q. I will grant you that, sir. It is your assumption then that in order to put something on the debit side of the ledger which was erroneously put on the credit side of the ledger in 1913—

A. (Interrupting) No. There was no assumption.

Q. They put in 1917 the \$92,000.00 figure?

A. There was no assumption about it. The credit to the stock account would have had to be, if it were entered at all, and properly, in the books, would have had to have balanced off a debit entry, and that would be an asset account.

[fol. 162] Q. Yes.

A. It was not done until after they had disposed of 324—or 434 shares, then the balance on that was entered as if it were a part of its inventory. Apparently, all of the other stocks were the same way, because they were introduced into the books by that entry, and a copy of the whole list was included in the certified public accountant's report that was for a period ending that same day.

Q. Mr. Hyder, you have not, in computing the value of that stock from its earnings, that Exhibit AA that you had there—those years are only from 1913 to 1919, is that correct? A. That is right.

Q. Why did you not consider including in those earnings the subsequent years, at least up to the year in which—that is in question—1943?

A. I would say, as a valuation engineer, that that was an ample period for the stock to demonstrate its value.

Q. It could not be because—

A. (Interrupting) Such—the sale was made in 1920 certainly demonstrates that it was not worth as much as it was in 1913.

Q. So you figure that you will take all the other years from 1913 and 1919 and exclude all subsequent years, regardless of earnings?

A. Regardless of all of the checking with this sale in 1920, as a valuation engineer I would take, for the purpose of judging what the expected future earnings would be, I would take a period that was on the same price level and as close to the valuation date as possible. Technically, rigorously, only earnings prior to the valuation date should be used, but where those are absolutely unavailable, the only recourse is to earnings subsequent to the valuation date.

Q. Well, now, if you are getting into the law of it—

A. (Interrupting) And here we have the earnings for seven years after the valuation—6 $\frac{2}{3}$ years, I should say.

Q. Have you finished? Now, if you get into your method of valuation, Mr. Hyder, don't you concur that in the absence of sales on the open market of stock, which is the true criterion of value, that you have to go to the property which was purchased to get its value, isn't that true, or not?

[fol. 163] A. I know that if the value of actual consideration, the securities comprising consideration can not be taken directly, then and then only it is permissible to go to the value of the property.

Q. Yes.

A. And in determining the value of this property, it was the lessee's equity in a leasehold, that is, the right to use the land and the right to the use of the building for the remainder of the 99-year lease, the value of the build-

ing is not the value of that interest in the leasehold, but has to be adjusted to whatever value, positive or negative, may attach to the right to use the land. In this case, according to the evidence of both sides, there was a substantial negative value corresponding to an excessive rental, an amount in excess of normal rental of similar ground at the time in the amount of at least \$7,000.00.

Q. That is what—you are basing your testimony now on the testimony of Mr. Weisels, is that right?

A. And the testimony of Mr. Farish.

Q. Now, let me ask you this, Mr. Hyder; you are establishing the value of stock in 1913 on what it sold for in 1920 in effect, aren't you?

A. No, I am not.

Q. Didn't you state a minute ago Mr. Chouteau bought the stock for—

A. (Interrupting) I have established the value on the basis of the sales that were made in 1913 and given consideration to the fact that the earnings of the company for the next seven years offered an utterly inadequate return even on that value.

Q. Would you say then that you were unfair to the taxpayer by disregarding all subsequent years that you take earnings close by into consideration?

A. I certainly would not use any years after 1919 in any event, because of the notorious rise in price level due to World War I, and to take the earnings all the way through to 1949, as I understand you are suggesting, is to further accept returns income which has resulted from a further inflation during World War II.

Q. Well, all other stocks were similarly affected, weren't they, by the conditions you mentioned?

[fol. 164] A. That is true, they were.

Q. Well, why did you single this stock out as apart from all other stocks then?

A. I do not. I would not accept such figures as the basis for determination of value for any stock as of this date.

Q. You know, as a matter of fact, that stocks fluctuate very materially from month to month, don't they?

A. Sometimes.

Q. And even from week to week?

A. Quite frequently.

Q. And they have been known to go down a tremendous lot overnight, haven't they?

A. That is true."

* * * * Questions by the Court:

"Q. Now I would like to ask some questions regarding the mortgage. When was this \$300,600.00 mortgage put on?

A. As of May 1st, the deed of trust was put on record May 1, 1913, the underlying deed of trust.

Q. Well, did the corporation have any other asset—the building company—besides this building—I mean by that the equity in this lease for the building?

A. No, it did not. The property was taken over on the organization date, a few days earlier.

Q. I take it then that you would consider the value of the assets on the stock basis as being the amount of the mortgage plus the value you put on the stock?

A. Yes, sir. That was the consideration given for the conveyance of the property. Their interest in this leasehold."

Recross-Examination.

They did not give their equity. They gave all of the capital stock plus a \$300,000.00 mortgage for the building and the stock I valued at \$108,000.00. That was all of the capital stock and the whole of the bond issue that they gave for the building.

Defendant's Exhibit "BB" was here offered and allowed in evidence.

[fol. 165] The Court then allowed defendant to put in evidence defendant's exhibits, A, B, C, C-1, D, D-1, E, F, G, H, I, J, K, L, M, N, O, P, R, R-1, S, T, U.

[fol. 166] "Mr. Frank: I desire to enter an objection here to Exhibit U, your Honor.

The Court: I will hear you:

Mr. Frank: This is an offering by the Missouri Lincoln Trust Company, dated May 20, 1913, to the stockholders of the Missouri Lincoln Trust Company, offering the stock

of the International Building Company to each stockholder and entitling them to subscribe for 1/5 more shares of building stock than the number of shares he now holds in Missouri Lincoln stock, at a price of \$18.00 per share. I object to that for the reason that it is an offering to a limited number of group constituting stockholders of the Missouri Lincoln Trust Company and is not a public offering to the general public and, therefore, constitutes no evidence as to the actual value of the stock of the taxpayer company at that time.

The Court: Overruled."

Defendant then offered in evidence its exhibit "V."

[fol. 167]

Exhibit V.

May 14, 1913.

Adjourned meeting of the Board of Directors held this day, W. F. Carter, President, presiding, the following members were present: Messrs. Arnstein, Collins, Hogan, Roberts, Sale and Wright.

On motion duly made and seconded it was declared the sense of the Board that the stock of the Mercantile Metal Milling Company owned by this Company be not offered at \$2500.00.

On motion duly made and seconded the claim of Green A. Fewel was referred to the attorneys of the Company for their advice and the officers were given power to act upon the advice of the attorneys.

The President reported that he had organized the International Building Company as directed at the meeting of the Board of Directors held on April 8th, 1913, and had caused the title to the leasehold at the southeast corner of Eighth and Chestnut Streets on which the Liggett Building is located, to be conveyed to said International Building Company and had caused to be executed a bond issue for \$300,000. thereon and had sold to the International Life Insurance Company \$150,000. of said bonds, and had leased to the International Life Insurance Company the entire sixteenth floor of the building formerly known as the Liggett Building for a period of ten years at an average annual rental of \$5650, and in consideration of leasing

said space and the purchase of said bonds had agreed with the International Life Insurance Company to cause the name of the building formerly known as the Liggett Building to be changed to International Life Building.

On motion duly made and seconded the action of the officers as above set forth was approved.

On motion duly made and seconded the matter of leasing quarters for the Missouri-Lincoln Trust Company was referred to the officers with power to act.

On motion duly made and seconded the accounting department was authorized to credit the bond account with \$300,000. and the stock account with \$100,000. on account of the bonds and stock of the International Building Company and to charge to profit and loss \$24,525. being the amount at which the bonds of the November Investment Company had heretofore been carried.

There being no further business, on motion the meeting adjourned.

W. F. CARTER,
President.

JAMES HAYWARD,
Secretary.

[fol. 168] "Mr. Frank: Just a minute. We object to the Exhibit V for the reason it seems to be irrelevant to any issue in this case.

The Court: What is it?

Mr. Frank: It is the minutes of the board of directors of the Missouri Lincoln Trust Company, of a meeting on May 14, 1913, and relates to what Mr. Hyder just testified to, crediting bond account with three hundred thousand and the stock account with one hundred thousand, as it is very evident that that is not relevant to what we are trying, for the reason that Mr. Hyder has admitted that any bookkeeper, when you enter up an asset, should debit an account with it and not credit it.

The Court: Overruled."

The defendant then offered its exhibits "X", "Z", "AA" and "BB" which were received in evidence.

[fol. 169]

Defendant's Exhibit BB.

FAB—11/10/50.

St. Louis, July 8, 1913.

Regular monthly meeting of the Board of Directors of the International Building Company held at the office of the Company this Tuesday, July 8th, at 1 p. m., present, W. F. Carter and M. P. Murray.

Ordered, that the President, W. F. Carter and Secretary James Hayward, be and are authorized and directed to execute and deliver a lease in due form to the United States of America by whomsoever represented, for the term of one year, beginning with the first day of July, 1913, and ending with the 30th day of June, A. D. 1914 of the following described property, viz.:

A small store room in the basement, rooms on the thirteenth floor designated and numbered 1301 to 1325, both inclusive, and rooms on the [seveenth] floor designated and numbered 1702 to 1708, both inclusive, in the International Life Building, formerly the "Liggett Building" situated on the southeast corner of [Eight] and Chestnut Streets, in the City of St. Louis, State of Missouri.

Said lease may provide that rooms on the [seveenteenth] floor numbered 1703-1705 may be used by the lessee as a printing department. That the Lessor shall furnish the necessary passenger elevator service, freight elevator service, janitor service and the heat, lights and water required in rooms and halls, and shall keep and maintain the said premises in a clean and sanitary conditions during the continuance thereof, and shall be responsible for and pay all liabilities for labor and material furnished in fulfillment of said agreement. That the United States reserves the right to quit, relinquish and give up the said premises or any part thereof within the period for which the lease is made or may be renewed by giving the lessor or its agent thirty days notice in writing, to that effect.

And May Contain such ~~other~~ and further agreements and covenants as may be agreed upon by the representative of the United States of America and said president of this company.

It is understood that the consideration for the lease is \$6724. per annum payable monthly at the end of each calendar month, or as soon thereafter as practicable, at the office of the Secretary and disbursing officer of the Mississippi River Commission at St. Louis, Missouri.

All acts and things done or suffered, or that may be done or suffered, by the President of this Company in the premises are hereby authorized, adopted, ratified, approved and confirmed.

Sig. W. F. CARTER,
President.

Sign. JAMES HAYWARD,
Secretary.

[fol. 170] The plaintiff then offered the deposition of Richard A. Boyle, when it was completed, in evidence and it was ordered received.

That was all the testimony.

[fol. 171] (Memorandum Opinion of District Court.)

(Filed in U. S. District Court on January 22, 1951.)

United States District Court,
Eastern District of Missouri,
Eastern Division.

International Building Company,
Plaintiff,

vs.

United States of America,
Defendant.

No. 6790(2)

Hulen, Judge.

This suit to recover \$16,297.96 in taxes, presents as a principal issue the valuation, as of May 1, 1913, of a leasehold, including an office building in the City of St. Louis. Plaintiff's claim to depreciation of \$12,500.00 for each of years 1943, 1944 and 1945; net operating loss carry-overs for same years, and excess profit credit of \$170,000.00 for 1945, depends on determination of the main issue. There is a claim for credit of capital stock tax for years 1943 and 1945, depending on whether such items are legally allowable during year paid if taxpayer is on an accrual basis, and a claim for credit for professional fees of \$6,360.00 paid in a bankruptcy reorganization proceeding, depending on whether it was deductible from gross revenue as "ordinary" business expenses.

I.

Decisions of the Tax Court finding valuation on the leasehold during years previous to those here in issue is claimed by plaintiff to be res adjudicata and to settle that issue in its favor. Defendant contends the decisions were by consent and not binding as to years other than set forth in the order of the Tax Court.

For the year 1933 a stipulation was signed by counsel for plaintiff and defendant (Ex. C) as follows:

[fol. 172] "It is hereby stipulated that there is no deficiency in Federal income tax due from the petitioner for the taxable year 1933 and that the following statement shows the petitioner's Federal income tax liability for the taxable year 1933:

Tax liability	None
Assessment (Jeopardy):	
January 23, 1943 (not paid) ..	\$2,188.12
Assessment to be abated	\$2,188.12"

On this stipulation the following "Decision" was made by the Tax Court (Ex. C-1):

"Under written stipulation signed by counsel for the parties in the above-entitled proceeding and filed with the Court on October 11, 1944, it is

Ordered and Decided: That there is no deficiency in income tax for the calendar year 1933."

The second "Decision" is of like origin and terms, but for another year.

The facts on which the stipulation is based covered valuation of the leasehold now in issue and the amount agreed on was the same as now claimed by plaintiff.

Plaintiff relies on *Commissioner v. Sunnen*, 333 U. S. 591. That case holds:

"* * * - where a question of fact essential to the judgment is actually litigated and determined in the first tax proceeding, the parties are bound by that determination in a subsequent proceeding even though the cause of action is different. * * *. And if the very same facts and no others are involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change."

The "Decisions" of the Tax Court relied on by plaintiff admittedly involved no hearings before the Tax Court, no facts were submitted to that Court, by stipulation or

otherwise, consequently there were no issues presented for the Court to decide. Without a judgment on the merits there is no foundation for a judicial determination of anything. Res adjudicata obviously cannot attach to such a proceeding. While the Tax Court entitled its memorandum "Decision", it was nothing more than an order confirming an agreement of counsel. There was no decision on any fact or issue.

"And a decision of that kind rendered by the Tax Court will not support a plea of estoppel in a case [fol. 173] of this nature involving liability for income tax for a different year. *Blaffer v. Commissioner*, 5 Cir., 134 F. 2d 389; *Hartford-Empire Co. v. Commissioner*, 2 Cir., 137 F. 2d 540, certiorari denied, 320 U. S. 787, 64 S. Ct. 196, 88 L. Ed. 473; *Riter v. Commissioner*, 3 T. C. 301." [Trapp v. United States (10th Cir.), 177 F. 2d 1, 5.]

II.

To fix the value of a fourteen-story office building, as of 37 years ago, as a determining factor in the value of a leasehold, is not a simple matter. This we feel even after hearing expert witnesses unhesitatingly express opinions on the subject. The fact that such opinions varied from a high of \$900,000.00 to a low of \$380,019.00 evidences that valuation by such methods is not an exact science.

The ground in question at Eighth and Chestnut Streets was leased for 99 years on December 27th, 1905. The ground rental was \$20,000.00, lessee to pay all taxes. Lessee was required to (and did) build a fourteen-story office building on the ground within two years, to cost not less than \$600,000.00. On April 14th, 1913, plaintiff corporation was organized and by deed recorded May 1st, 1913, acquired the leasehold. The consideration stated in the minutes of plaintiff was all of the authorized capital stock and bonds of plaintiff, consisting of 6,000 shares of common stock of par value of \$50.00 per share, and \$300,000.00 face value first-mortgage bonds. The plaintiff's only asset was the (building on) leasehold. May 1, 1913, is the base period for fixing valuation for the tax claims in issue.

The bonds were sold for face value and as to that \$300,000.00 in value there is no issue. Plaintiff argues there is "no measure of value of the stock except the value of the property" and this it attempted to show was "\$750,000.00" to "\$900,000.00", by opinion of two men who had been in the real estate business in St. Louis for many years.

Defendant determined the cost of plaintiff's interest in the leasehold, as of May 1st, 1913, to be \$430,000.00. This determination is presumed to be correct. The burden is [fol. 174] upon the petitioner to prove this finding is wrong. *Gloyd v. Commissioner of Internal Revenue* (8th Cir.), 63 F. 2d 643 [3, 4].

Considerable time has been spent by plaintiff in attacking the defendant's methods in arriving at the valuation of \$430,000.00. The issue now is correctness of the valuation figure regardless of how made.

In opposition to the opinions of real estate dealers evidence was offered by defendant of transactions represented by authentic book entries, and other documents, contemporaneous with the acquiring of the leasehold by plaintiff.

Plaintiff was organized by the Missouri Lincoln Trust Company.* At that time the leasehold was held by a subsidiary of Missouri-Lincoln. On May 14th, 1913, after plaintiff acquired the leasehold, Missouri-Lincoln authorized a credit to its bond account of \$300,000.00, on account of plaintiff's bonds, and a credit to its stock account of \$100,000.00, on account of the plaintiff's 6,000 shares of stock with a par value of \$50.00; a total of \$400,000.00. The credits reflect the seller's cost of the leasehold. A balance of \$24,525.00 was written off in the profit and loss account. (See stipulation 11-C.) While not conclusive we think these activities reflect an appraisal on May 1st, 1913, of some value. We doubt Missouri-Lincoln would have entered a loss of \$24,525.00 and confined the value of cost of the leasehold to \$400,000.00, had they been of the opinion the leasehold value was anywhere near twice that sum, as placed by plaintiff's witnesses. On January 21st,

* Hereinafter referred to as Missouri-Lincoln.

1906, Missouri-Lincoln had underwritten a bond issue of \$450,000.00 secured by first mortgage on the property. In July, 1907, a subsidiary of Missouri-Lincoln had acquired the property. The deed gave the consideration as \$775,000.00. On October 7th, 1908, this subsidiary having defaulted, plaintiff's record grantor, another subsidiary of Missouri-Lincoln, purchased the property at foreclosure for a stated bid of \$25,000.00.

[fol. 175] The valuation of \$100,000.00 for the 6,000 shares of stock represents approximately \$16.67 a share. On May 20th, 1913, Missouri-Lincoln offered to its stockholders the 6,000 shares of stock of plaintiff by subscription at \$18.00 per share. Only 434 shares were sold by closing day of October 21, 1913. It is hard to believe that if informed appraisers had the same opinion in May, 1913, as plaintiff's appraisers now have, retrospectively, that this stock would have gone begging at \$18.00 a share. According to plaintiff's present estimate the stock had a value in excess of \$50.00 a share on May 1, 1913.

In 1917 the Secretary of Missouri-Lincoln advised defendant by letter that the unsold shares had been for sale, to the public, at all times, at \$18.00 a share. In 1919, 17 more shares were sold for \$18.00 a share. In 1918 plaintiff's tax return admits the fair market value of the stock, as of September, 1918, to be \$108,000.00, based on a sale to Missouri-Lincoln at \$18.00 a share. A like admission is made in the 1919 tax return. The 1920 tax return admits a value of \$15.33 per share. In the 1917 tax return of the plaintiff the Secretary of plaintiff represented "it was not possible to state that value [of the stock] in excess of the price" for which it had been sold. The remainder of the stock went to its present owner on April 2, 1920, at a price of \$13.67 per share, total payment therefor \$82,000.00.

How can this Court accept the testimony of appraisers today as to what in their opinions this leasehold was worth nearly forty years ago, as showing defendant's determination is wrong, when defendant's valuation exceeds opinions expressed at the time in question, in the manner above outlined?

There is a line of cases holding, if property is acquired for stock or securities its cost is the market value of the securities, or stock. Section 113 (a) of the Internal Revenue Code. *Hinkel vs. Motter* (D. C., D. Kan.) 39 F. 2d 159. It appears the Commissioner, without knowledge of [fol. 176] sales of plaintiff's stock based its appraisal on reproduction cost of the building, less depreciation, and present worth (as of date of acquisition) of expected future rentals from the leasehold, and arrived at the sum of \$430,000.00 as a fair valuation—a figure substantially the same as that reflected by sale of the stock for \$100,000.00 plus \$300,000.00 represented by bonds.

We find the opinion evidence of the two witnesses produced by plaintiff does not represent evidence of such probative force as to be sufficient to overcome the determination of the Commissioner. Two wars have come and gone, with their inflating and deflating impact on values of property. We think it stretches expert opinion to the breaking point under these circumstances to ask that it be accepted to contradict a value reflected in sales of the securities paid for the leasehold where the margin between sale of securities and the opinion given today is one to five. We are unable to account for such a wide difference in opinion, except as an error in the judgment of plaintiff's witnesses. If the seller was in error in undervaluing the stock at one-fifth of its real value, in 1913, strange indeed that only 434 of the 6,000 shares were able to find a buyer. The restricted sale lasted only six months, then sales were thrown open to the public with the result that in 1919 seventeen more shares were sold at \$18.00. Then in 1920, after the bonded indebtedness had been reduced from \$300,000.00 as of 1913 to \$265,000.00, the remainder of the stock was sold for \$13.67 a share.

Plaintiff has failed to carry the burden of proof on this issue and claim.

III.

* The plaintiff by its own choice elected to make returns on an accrual basis. During the years 1943 and 1946 plaintiff paid a capital stock tax and deducted the amounts in its returns for those years as though on a cash basis. It [fol. 177] is the holding of the Commissioner that capital

stock tax accrues at the beginning of the capital stock tax period rather than at its close, or when the tax is paid; that the deduction for 1942 (paid in 1943) should have been deducted in 1942, as it accrued and plaintiff incurred the liability on July 1st of that year, and capital stock tax for fiscal year ending June 30th, 1945 (paid in 1946) accrued October 7, 1944, when custody of assets under reorganization proceedings was restored to plaintiff. The deductions were disallowed because payment was not on an accrual basis. We think a return is improper that would mix the two systems. It is no answer that plaintiff could not determine the amount of its tax a year previous to payment. Plaintiff of necessity finds that to be the case with many of its deductions under the accrual system. It must use the best information and estimate available.

There is no issue, as I read the briefs, but what plaintiff would have been allowed the deductions had they been taken in the right years, and this fact makes us pause to enforce the rigid rule referred to.

The Government's brief states a deduction was allowed in 1944 for the 1945 payment. Why plaintiff should still be litigating for that deduction, or why a deduction was not allowed in 1942 for the 1943 payment, is left unexplained.

We think in equity and fair dealing that plaintiff should be allowed the 1943 payment as a deduction for 1942, as was done in the case of the 1945 payment. Unless the parties desire to present a further record, in view of these observations, plaintiff will be allowed its claim for the capital stock paid in 1943.

IV.

Plaintiff paid and took a deduction in 1944 for attorneys' fees, of which sum \$6,360.00 was disallowed. Plaintiff had been in default on its bonds and the trustee in the mortgage securing the bonds filed suit to foreclose. Whereupon plaintiff took advantage of proceedings under [fol. 178] Chapter X of the Bankruptcy Act. The approved plan of reorganization called for \$8,000.00 in bonds to be cancelled, and \$145,000.00 par value bonds to be surrendered on payment of 90% of par value. This resulted

in cancellation of the existing first mortgage. A new lien maturing in twelve years was placed on the premises. By this proceeding plaintiff preserved its leasehold and cut down its indebtedness. Plaintiff claims no capital asset was acquired and the attorneys' fee paid in prosecuting the bankruptcy proceeding is a general business expense. Defendant disputes the claim and insists the item is properly a capital expenditure and not deductible as an ordinary business expense.

Section 29.23(a)-15 of Treasury Regulations 111 would seem to be against plaintiff's position. Also numerous holdings of the Tax Court. See *Bush Terminal Buildings Co. v. Commissioner*, 7 T. C. 793, 819. There are rulings of the Courts of Appeals to the same effect. *Skenandoa Rayon Corp. v. Commissioner* (2nd Cir.) 122 F. 2d 268. By the latter we are bound.

Let findings of fact, conclusions of law and judgment be presented.

RUBEY M. HULEN,
Judge.

[fol. 179] (Addition to Memorandum Opinion of District Court.)

(Filed in U. S. District Court on February 23, 1951.)

United States District Court,
Eastern District of Missouri,
Eastern Division.

International Building Company,
a Corporation,

Plaintiff,

vs.

United States of America,

Defendant.

No. 6790
Hulen, Judge.

The Government has filed a further brief in this case explaining their position more fully with regard to the capital stock tax deductions involved under the pleadings

and since filing of that memorandum plaintiff's counsel has admitted in open court that there is no basis for allowing the capital stock deductions claimed by them.

Therefore the order in this case will be to dismiss the complaint at plaintiff's costs.

RUBEY M. HULEN,
Judge.

[fol. 180] (Findings of Fact and Conclusions of Law.)

(Filed in U. S. District Court on February 23, 1951.)

In the United States District Court
For the Eastern District of Missouri.

International Building Company,
a corporation,

Plaintiff,

v.

No. 6790

United States of America,
Defendant.

The above entitled cause came on for trial on the 8th day of November, 1950, the Court sitting without a jury, plaintiff appearing by his attorney, Malcolm I. Frank, Esquire, and the Government appearing by its attorney, Clarence J. Nickman, Esquire, Special Assistant to the Attorney General, and witnesses having been sworn and having testified, exhibits introduced in evidence and written briefs filed, the Court having considered all of said evidence and briefs and having rendered a memorandum opinion, and the Court being fully advised, now makes the following

Findings of Fact.

1. That upon the trial the parties, through their respective counsel, having duly made and filed a written stipulation of facts, the Court finds as facts the matters recited therein exclusive, however, of such statements as

may recite the respective contentions and position of the plaintiff.

2. That the Tax Court decisions and judgments of no deficiencies for 1933, 1938 and 1939 did not dispose of any fact or issue.

3. That for valuation purposes the leasehold covered an office building which was fully completed and finished by May 1, 1913.

[fol.181] 4. That the leasehold on the land had a negative value of not less than \$7,000 per annum.

5. That plaintiff's own appraisal of its shares of stock on May 1, 1913, was a maximum of \$18 per share and not more than \$108,000 for the entire issue.

6. That the value to the plaintiff of the leasehold as of May 1, 1913, was not in excess of \$430,000.

7. That the building was fully depreciated prior to the end of 1942.

8. That the plaintiff's equity invested capital attributable to the leasehold was not more than \$130,000.

9. That the plaintiff had no net operating loss carry-over available for carrying forward to 1945.

10. That the plaintiff reported the calendar year 1942 as a loss year and claimed and was allowed in that year a deduction for capital stock tax in the amount of \$187.50. (Ex. N.)

11. That the attorneys' fees paid in connection with the plan for the taxpayer's reorganization under Chapter X of the Bankruptcy Act represented a capital expenditure.

Conclusions of Law.

1. That neither of the two Tax Court decisions and judgments of no deficiencies for 1933, 1938 and 1939 constituted a judgment on the merits within the meaning of Commissioner v. Sunnen, 333 U. S. 591, and, therefore, those decisions cannot give rise to an estoppel by judgment or support a plea of res judicata.

2. That the unadjusted basis of the plaintiff's interest in the leasehold estate as of May 1, 1913, was not in excess of \$150,000.

3. That the unadjusted basis of the plaintiff's interest in the leasehold estate as of May 1, 1913, was properly determined by the Commissioner of Internal Revenue.

4. That the building was fully depreciated prior to the end of 1942.

[fol. 182] 5. That the Commissioner properly disallowed depreciation taken for each of the years 1943, 1944 and 1945.

6. That for the purpose of computing the plaintiff's excess profits credit for 1945, the Commissioner properly limited to \$130,000 the amount of equity invested capital attributed to the leasehold, and the Commissioner properly determined a deficiency in excess profits tax for 1945 of \$1,811.06.

7. That the Commissioner properly determined the plaintiff had no net operating loss carryover available for carrying forward to 1943.

8. That the Commissioner properly disallowed the capital stock tax payments taken by the plaintiff as deductions in the years in which such payments were made, viz., 1943 and 1945.

9. That the Commissioner properly disallowed as a deduction the attorneys' fees paid in connection with the plan for taxpayer's reorganization under Chapter X of the Bankruptcy Act.

10. That the plaintiff has not overpaid taxes or interest in any amount.

11. That the plaintiff has failed in its burden of proof to establish the assessment, collection and retention of the taxes and interest complained of herein was or is illegal.

12. That all of the assessments against and payments by the plaintiff were proper, just and lawful.

13. That the plaintiff is not entitled to a recovery in any amount.

14. That this action should be dismissed and judgment should be entered in favor of the United States, together with costs and disbursements of this action.

RUBEY M. HULEN,
United States District Judge.

[fol. 183]

Judgment.

(Filed in U. S. District Court on February 23, 1951.)

In the United States District Court for the
Eastern District of Missouri.

International Building Company,
a corporation,

Plaintiff,

v.

United States of America,
Defendant.

No. 6790
Before Hulen, J.

And, Now, to-wit: On the 23rd day of February, 1951, in accordance with the Memorandum of the Court handed down on January 22, 1951, it is Ordered that Judgment be and is hereby entered in favor of Defendant, United States of America, and against Plaintiff, International Building Company, with costs to the Defendant.

By the Court,

JAMES J. O'CONNOR,
Clerk.

Entered

RUBEY M. HULEN,
United States District Judge.

[fol. 184] Plaintiff's Motion to Set Aside Judgment and for New Trial.

(Filed in U. S. District Court on March 2, 1951.)

Comes now plaintiff, International Building Company, and moves the Court to set aside its judgment entered February 23, 1951, and grant it a new trial, and for grounds thereof states:

1. The judgment is against the evidence, against the weight of the evidence and against the law under the evidence.
2. The Court erred in its finding of fact Number 2 that the Tax Court decisions and judgments of no deficiencies for the years 1933, 1938 and 1939 did not dispose of any fact or issue, in that said holding is contrary to law.
3. The Court erred in its finding of fact Number 4 that the leasehold on the land had a negative value of not less than Seven Thousand Dollars (\$7,000.00) per annum in that such holding is contrary to the evidence and the weight of the evidence.
4. The Court erred in its finding of fact Number 6 in holding that the value to the plaintiff of the leasehold as of May 1, 1913, was not in excess of Four Hundred Thirty Thousand Dollars (\$430,000.00) in that such holding is contrary to the evidence, the weight of the evidence and [fol. 185] the law under the evidence in that by such holding the Court has permitted the Government to maintain an inconsistent position on the value of plaintiff's shares of stock from which the Court determined the value of the leasehold on the valuation date in question.
5. The Court erred in its finding of fact Number 7 in holding that the building was fully depreciated prior to the end of 1942 in that such holding is contrary to the evidence and the weight of the evidence and the law under the evidence, in that the Court has permitted the Government to maintain an inconsistent position as to the value of plaintiff's shares of stock on the valuation date in question, from which the Court determined the valuation of plaintiff's building for depreciation purposes; and by disregarding plaintiff's evidence thereon.

6. The Court erred in holding in its finding of fact Number 8 that plaintiff's equity invested capital attributable to the leasehold was not more than One Hundred Thirty Thousand Dollars (\$130,000.00), in that such holding is contrary to evidence, contrary to the weight of the evidence and contrary to the law under the evidence, in that by such holding the Court has permitted the Government to maintain an inconsistent position as to the valuation of plaintiff's shares of stock which the Court used in arriving at its finding.

7. That the Court erred in its finding of fact Number 9 in holding that plaintiff had no net operating loss carry-over to carry forward to 1945, in that such holding is against the evidence, the weight of the evidence and the law under the evidence in that in arriving at such holding the Court permitted the Government to maintain an inconsistent position as to the value of plaintiff's shares of stock.

8. The Court erred in its finding of fact Number 11 that the attorneys' fees paid in connection with the plan for [fol. 186] taxpayers reorganization under Chapter 10 was a capital expenditure in that such holding is contrary to law.

9. This being an equity case the Court, by its judgment, has failed to do equity in that by its judgment it has permitted the Government to maintain an inconsistent position and to repudiate its own valuation of plaintiff's shares of stock. By such holding the Court has permitted the Government to fix a valuation on plaintiff's shares of stock and collect a tax thereon and permitted them to adopt another valuation on plaintiff's shares of stock lower than its first valuation so as to collect additional tax by reason thereof which is contrary to all the principles of equity.

10. The Court erred in permitting the witnesses, Ruggles and Hyder to testify as real estate expert witnesses over the objection of plaintiff when such witnesses were not qualified as such.

11. The Court erred in basing its judgment on hearsay testimony and upon incomplete and insufficient book en-

tries in the books of the Missouri-Lincoln Trust Company which were entered four years after it received the shares of stock in question.

12. The Court erred as a matter of law in its judgment in holding that the sales of shares of stock by Missouri-Lincoln Trust Company to its own stockholders was evidence of the market value of such shares; and for the further reason that there is nothing before the Court to show what transactions transpired between the Nina Realty Company, who initially received such shares, and the parent company, the Missouri-Lincoln Trust Company, which caused it to place the value it did upon the shares of stock in question in offering the same to its stockholders; and for the further reason that there was no evidence before the Court of any public offering of the shares of stock in question.

13. The Court erred in holding that plaintiff had failed [fol. 187] in its burden of proof to establish that the assessment of the taxes complained of was illegal.

14. The Court erred in its judgment by not holding that the valuation of plaintiff's building for depreciation purposes was Eight Hundred Sixty Thousand Dollars (\$860,000.00).

15. The Court erred in not holding that the fixing of the valuation of plaintiff's shares of stock by the Government at Three Hundred Forty-eight Thousand Six Hundred and Seven Dollars (\$348,607.00) for capital stock tax purposes had the same value for the purposes of determining its invested capital in its building for depreciation purposes; that by not so holding the Court has failed to do equity and permitted the Government to collect the tax on one valuation for one purpose and, in the present case, to place another valuation for another purpose. Such action shocks the conscience of equity and is against equity.

16. The Court erred in failing to hold that the stipulation filed in the Tax Court was equivalent to an agreement that the value of plaintiff's building for depreciation purposes was Eight Hundred Sixty Thousand Dollars (\$860,000.00), and in failing to hold that the Board of Tax Appeals' judgments thereon were res adjudicata; and by

reason thereof in failing to hold that the Government was thereby estopped from placing different valuation on the building for depreciation purposes.

17. The Court erred in its conclusions of law, numbers 1 to 14 inclusive, as filed in the cause, in that all of said conclusions of law are contrary to law.

For the reasons assigned it is respectfully prayed that the Court set aside its judgment and enter a judgment for [fol. 188] plaintiff as prayed in its petition or in lieu thereof to set aside the judgment and grant plaintiff a new trial herein by reasons of the errors of fact and law set forth above.

MALCOLM I. FRANK,
Attorney for plaintiff,
722 Chestnut Street,
St. Louis 1, Missouri,
GARfield 0246.

Receipt acknowledged herewith of three copies of the aforesaid motion and attached memorandum this 2nd day of March, 1951.

WM. V. O'DONNELL,
Assistant United States Attorney,
Attorney for Defendant.

[fol. 189] Plaintiff's Memorandum in Support of Motion
for New Trial.

I.

As to So-called Burden of Proof.

The Court in its memorandum opinion stated that the burden was on the plaintiff to prove that the finding of the Commissioner was wrong and citing in support, Gloyd v. Commissioner of Internal Revenue, 63 Federal (2) 643. We respectfully submit that that is not the law.

The Court has evidently failed to distinguish between those cases that originate in the Tax Court and are tried

there and cases like the present where the suit is filed for refund. In cases before the Tax Court the plaintiff is bound by the rules of the Tax Court which specifically provide that the burden of proof is upon the taxpayer. However, a different rule prevails in suits for refund. In such refund suits there is always the presumption in favor of the Government that the Commissioner's assessment or his determination is correct. However, this presumption does no more than to require the taxpayer to go forward with his proof that the determination was invalid and that he does not owe the tax, which has been collected by the Government.

[fol. 190] Our Supreme Court in *U. S. v. Mitchell*, 271 U. S. 9, 46 Supreme Court 418, 419, in such case said.

"The burden is on the executors to establish the invalidity of the tax."

To the same effect and in practically the same words, the Supreme Court held similarly in *First National Bank v. Anderson*, 269 U. S. 422, 46 Supreme Court 131, 135, and in discussing this same rule our Supreme Court in *Helvering v. Taylor*, 293 U. S. 507, 55 Sup. Ct. 287, 290, in discussing an arbitrary and erroneous apportionment of capital gain and which was on its face arbitrary and erroneous, the Court said,

"We find nothing in the statute, the rules of the board or our decisions that gives any support to the idea that the Commissioner's determination shown to be without rational foundation and excessive will be enforced unless the taxpayer proves he owes nothing, or if liable at all, shows the correct amount."

A Commissioner's determination may be wrong but still not invalid and where on its face as here the Commissioner's determination is invalid and arrived at by invalid means, the plaintiff has overcome the presumption of correctness and the case stands on an even footing as to proof. In our case the plaintiff has overcome this presumption by showing the invalid determination of the tax by expert testimony of accountants that Hoskold's formula was not applicable. That alone shows the invalidity on its face and therefore by reason of the above we be-

lieve the Court's construction of the law in its memorandum to be in error.

II.

The Question of Estoppel and Res Adjudicata.

On this point the Court in its memorandum stated that the judgment of the Tax Court was nothing more than an order confirming an agreement of counsel. We respect- [fol. 191] fully submit that such is not the law. The judgments entered were binding on both parties. They were the result of an agreement evidenced by a stipulation that there were no taxes due and as there was only one issue in the case, the basis for depreciation constitutes an admission that the taxpayer is correct in his petition and that judgment may be entered accordingly. No other possible construction can be placed thereon and the Court's construction of the wording in the Sunnen Supreme Court case, 33 U. S. 591, we submit as improper and not applicable to consent judgments such as the instant ones. If the Courts were correct in the statement that every tax-year stands on its own footing, then there is nothing to prevent the Government from every year making another assessment on a still higher basis and collecting it, and that is exactly what the Supreme Court said could not be done, that there must be an end to litigation.

The Court has entirely turned its back on the effect of consent decrees and we again call the attention of the Court to the rulings of appellate courts on this matter to which we respectfully submit this Court is bound. In the following cases the Courts held that a consent decree has the same force and effect as any other judgment and is as conclusive on the parties as if the suit had been an adversary one. See *Standard Oil Company v. Clark*, 163 Fed. (2) 917, cert. denied, 333 U. S. 873. *Utah Power and Light Company v. U. S.* 42 Fed. (2) 304; *Snell v. J. C. Turner Lumber Company*, 285 Fed. 356, cert. denied, 261 U. S. 616; *Rector v. Sunnen Lumber Company*, 52 Fed. (2) 964; *O'Cedar Corporation v. Woolworth Company*, 66 Fed. (2) 363, cert. denied, 291 U. S. 666. The stipulation in the instant case was a stipulation of a compromise agreement that there was no deficiency in income tax, that

being the only one issue before the Court a consent decree was entered.

[Vol. 192] As to the estoppel feature in the case, the Court has placed a great deal of emphasis and evidently relies to a great extent on the admissions in the tax returns of taxpayer that the stock was only worth One Hundred and Eight Thousand Dollars (\$108,000.00) but the Court has evidently entirely overlooked the fact that the Commissioner of Internal Revenue rejected such valuation of plaintiff's stock and wrote them a letter on September 7, 1917, which reads as follows:

"Treasury Department,
Washington, D. C.; September 7, 1917.

Re: Capital Stock Tax, International Building Company, 722 Chestnut Street, St. Louis, Missouri.

Gentlemen:

Receipt is acknowledged of your recent communication explaining the fair value of stock of your Company estimated on the return of capital stock tax, Form 707, filed with the Collector of Internal Revenue, First District of Missouri, on January 17, 1917, at \$18.00 per share.

In reply, you are advised that the statements contained in your letter have been carefully considered, but in view of the value indicated by your statement of assets and liabilities of June 30, 1916, this Office is of the opinion that the fair value of stock is at least \$348,607.00. An assessment of additional capital stock tax in the amount of \$60.00 will therefore be made against the Company in the next adjustment list. The Collector will forward you a bill for the tax due and payment should be made direct to him within ten days after the receipt thereof.

Respectfully,

G. E. FLETCHER,
Deputy Commissioner."

In the above letter the Government refused to accept such valuation and placed the valuation of the stock at

Three Hundred Forty-eight Thousand, Six Hundred and Seven Dollars (\$348,607.00), and assessed a tax on the basis of such valuation and collected it:

We respectfully submit that the ruling of the Court in adopting a different valuation of the stock permits the Government to maintain an inconsistent position and enable the Government, once having received the benefit by placing a certain valuation of stock, to now place another valuation on it and receive another benefit. Such is not the law nor do we think that the Court should permit it in equity and good conscience. The cases in our Appellate Courts have held that this cannot be done.

In *Woodworth v. Kales*, 26 Fed. (2) 178, 181, 6th Circuit, which was a suit for refund of taxes, the Court held that where an income tax was assessed in 1919, under the Revenue Act of 1918 on profits from the sale of stock based upon the fair value of stock in 1913, and such fair value was placed thereon by the Commissioner and the assessment and valuation were approved and paid, that the Commissioner could not assess an additional tax upon a new and different so-called fair value valuation.

In *Joseph Eichelberger v. Commissioner*, 88 Fed. (2) 874, 875, certain deductions were made in the 1930 tax return and were disallowed by the Commissioner. The loss was taken later for a different year and the Court held that the United States got the benefit of its decision and must abide by it and could not again disallow the loss.

In *Ford Motor Company v. U. S.*, 9 Fed. Suppl. 590, 601, (Ct. of Cl.) cert. denied, 296 U. S. 636, in a suit for tax refund, it was shown in the opinion that the Commissioner acted in accordance with statute and had previously treated the two companies, Ford of Delaware and Ford of Michigan, as two separate entities. The Court then said,

- "It necessarily follows that they must be regarded and treated on the same basis on all transactions having to do with such tax liability."

Applying the principles of the above cases to the facts in the instant case, once the Government fixes the value

[fol. 194] of the stock as it did in this case and collects the tax on the basis of such valuation, it cannot turn around and thirty-five years later place another valuation on the same identical shares of stock and collect another tax thereon. We respectfully request the Court to give this his most serious consideration as we feel that in his ruling dismissing the suit the Court has not done equity and has permitted the Government to do an unconscionable act. We respectfully submit that by reason thereof the Government is estopped to place any other valuation than that which its own Commissioner placed upon the stock. With reference to the inconsistent position which we maintain the ruling of the Court has permitted the Government itself to maintain here, is what the Tax Court itself has said on the point. In the estate of James Amm B. T. A. Memo. Op Docket 93476 (July 10, 1939) the Court said that the Government was estopped from taking an inconsistent position in contending a trust was invalid and therefore includable in [in] gross estate for state tax purposes, where in a former income tax proceeding it had upheld the validity of the trust. In that case the Court said that taking a position for the purpose of collecting one tax, the Government could not take another position for the purpose of collecting a different type of tax, and such is the case here.

For the reasons assigned it is respectfully submitted that the Court order set aside its judgment and grant plaintiff a new trial.

Respectfully submitted,

MALCOLM I. FRANK,
Attorney for Plaintiff,
722 Chestnut Street,
St. Louis 1, Missouri.
GARfield 0246.

[fol. 195] (Order of District Court overruling Motion of Plaintiff for New Trial.)

(Filed in U. S. District Court on May 15, 1951.)

Motion of plaintiff for a new trial is overruled.

RUBEY M. HULEN,
Judge.

[fol. 196] Notice of Appeal.

(Filed in U. S. District Court on July 10, 1951.)

In the District Court of the United States
for the Eastern Division of the Eastern
Judicial District of Missouri.

International Building Company,
a corporation,

Plaintiff,

vs.

The United States of America,
Defendant.

No. 6790
Div. No. 2

Notice is hereby given that International Building Company, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from the final judgment entered in this action on February 23, 1951, and from the order overruling motion for new trial, entered May 15, 1951.

MALCOLM I. FRANK,
320 North 4th Street,
St. Louis 2, Missouri,
CHestnut 6610,
Attorney for Appellant.

[fol. 197] (Memorandum relating to Cost Bond on Appeal.)

The Cost Bond on Appeal in the sum of \$250.00 was filed in the U. S. District Court for the Eastern District of Missouri on July 10, 1951, and the same was made a part of the copy for printing at this place, but such Cost Bond on Appeal is omitted from this printed record.

[fol. 198] Order Extending Time for Filing Record on Appeal.

(Filed in U. S. District Court on August 15, 1951.)

On oral application of Appellant, International Building Company, through its counsel and for good cause shown, it is hereby ordered that time be extended to Appellant for filing the record on appeal and that Appellant is granted until October 5, 1951 to file its record on appeal.

ROY M. HARPER,
Judge.

St. Louis, Missouri,
August 14, 1951.

[fol. 201] (Docket Entries in U. S. District Court.)

International Building Company,
a corporation,

vs.

United States of America.

No. 6790.

Clerk's Docket Entries.

1949

October 17—Complaint filed and summons issued directed to defendant returnable within 60 days after service.

October 27—Marshal's return of service to summons, etc., filed (executed).

December 14—On oral application, deft. granted to and including February 17, 1950, within which to answer.

1950

February 16—Motion of defendant to dismiss for lack of jurisdiction over subject matter and over the person, with memo. in support thereof, filed.

March 10—Motion of defendant to dismiss argued and submitted; brief of plttf. forthwith presented and defendant granted 5 days within which to submit answering brief, if it so desires.

March 16—Memorandum and order filed and entered overruling motion of deft. to dismiss.

March 24—Answer of defendant to plttf's complaint filed.

July 28—Case set for trial on Monday, November 6, 1950.

November 6—Cause passed to November 8, 1950.

November 8—Parties appearing and announcing ready for trial, final hearing of cause before the Court is commenced and the introduction of evidence in chief on behalf of plttf. on such final hearing is [commencea] and concluded. Thereupon the introduction of evidence on behalf of defendant is commenced but not being concluded at hour of adjournment, further proceedings on such final hearing postponed until tomorrow at two p. m.

November 9—Again come parties; whereupon final hearing of cause before the Court is resumed and the introduction of evidence on behalf of deft. is resumed but not being concluded at hour of adjournment, further proceedings on such final hearing postponed until tomorrow at ten a. m.

November 10—Again come parties; whereupon final hearing of cause before the Court is resumed and introduction of evidence on behalf of deft. on such final hearing is resumed and concluded. Thereupon issues are submitted on briefs to be presented and plttf. granted to November 24, 1950 to submit brief, and deft. to December 15, 1950 to submit answering brief.

November 13—Deposition of Richard A. Boyle taken on behalf of plttf. at St. Louis, Mo., on November 9, 1950 before Floyd A. Buchanan, a Notary Public, filed.

[fol. 202] 1951

January 22—Memo opinion of the Court determining issues submitted on final hearing and directing findings of fact, conclusions of law and judgment be presented in accordance therewith, filed.

February 1—Transcript of portion of testimony of witness Ethel A. Giblin given at trial of cause before the Court commenced November 9, 1950, filed by Official Court Reporter of Court No. 2.

February 23—Addition by the Court to memo opinion herein filed. Findings of fact and conclusions of law of the Court filed and final judgment in accordance therewith filed and entered finding issues in favor of defendant and dismissing cause at plaintiff's costs.

March 2—Pltff's motion to set aside judgment and for new trial with request for oral argument, filed.

March 9—Motion of pltff. to set aside judgment and for a new trial submitted by defendant and taken as submitted by movant, and defendant granted 10 days in which to submit brief.

May 11—Motion of pltff. to set aside judgment and for new trial argued and submitted.

May 23—Motion of plaintiff to review Clerk's taxation of costs and to retax costs, including request for oral argument, filed.

May 28—On oral motion of defendant, order filed extending to June 28, 1951 time of defendant to file answer to memorandum of plaintiff in support of plaintiff's motion to review taxation of costs.

May 29—Memorandum of defendant in answer to plaintiff's motion and brief to review of taxation of costs herein, filed.

June 8—Plaintiff's motion to review Clerk's taxation of costs and to retax case, argued and submitted.

June 13—Order on pltff's motion to retax costs filed sustaining said motion in designated particulars.

July 10—Notice of appeal of plttf. to United States Court of Appeals, 8th Cirenit, from final judgment entered herein February 23, 1951 and from order overruling motion for new trial entered May 15, 1951, filed and copy of said notice of appeal forthwith mailed by Clerk of the Court to Drake Watson, U. S. Atty.

July 23—Cost bond on appeal of plttf. in the penal sum of \$250.00 filed.

August 15—Order filed extending time of plttf. for filing record on appeal to U. S. C. A., 8th Circuit, to Oct. 5, 1951.

September 7—Transcript of testimony and proceedings had on trial of cause commencing November 8, 1950, filed by Official Court Reporter of Court No. 2.

September 10—Plttf's designation of record on appeal filed.

I, James J. O'Connor, Clerk, U. S. District Court, Eastern District of Missouri, do hereby certify that the above is a true and correct copy of the docket entries in the above entitled cause.

JAMES J. O'CONNOR,

Clerk,

By JOHN J. JARVIS,

Deputy Clerk.

(Seal)

Dated this 27th day of September, 1951.

And thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Eighth Circuit, viz:

(Appearance of Counsel for Appellant.)

UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

No. 14465

INTERNATIONAL BUILDING COMPANY, a corporation, *Appellant*,

v.

UNITED STATES OF AMERICA.

The Clerk will enter my appearance as Counsel for the Appellant.

MALCOLM I. FRANK

320 N. 4th St.,

St. Louis, Mo.

(Endorsed): Filed in U. S. Court of Appeals, Oct. 5, 1951.

(Appearance of Mr. Theron Lamar Caudle and Mr. Ellis N. Slack as Counsel for Appellee.)

The Clerk will enter our appearances as Counsel for the Appellee.

Theron Lamar Caudle

Assistant Attorney General

Ellis N. Slack

Special Assistant to The Attorney General

(Endorsed): Filed in U. S. Court of Appeals, Oct. 5, 1951.

(Appearance of Miss Melva M. Graney as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

MELVA M. GRANEY

Special Asst. to the Atty. Genl.

(Endorsed): Filed in U. S. Court of Appeals, May 7, 1952.

(Order of Submission.)

September Term, 1951.

Thursday, May 8, 1952.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Malcolm I. Frank for appellant, continued by Miss Melva M. Graney, Special Assistant to The At-

torney General, for appellee, and concluded by Mr. Malcolm I. Frank for appellant.

Thereupon, this cause was submitted to the Court on the printed record and briefs of counsel filed herein.

(Opinion.)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14,465.

INTERNATIONAL BUILDING COMPANY, a corporation, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for Eastern District
of Missouri.

[September 19, 1952.]

Malcolm I. Frank for Appellant.

Melva M. Graney, Special Assistant to the Attorney General, (Ellis N. Slack, Acting Assistant Attorney General, Robert N. Anderson and Carolyn R. Just, Special Assistants to the Attorney General, and George L. Robertson, United States Attorney, on the brief), for Appellee.

Before SANBORN, JOHNSON, and COLLET, Circuit Judges.

COLLET, Circuit Judge.

This action is for recovery of income taxes, declared value excess profit taxes, and excess profit taxes for the years 1943, 1944 and 1945. The controversy arises from the Commissioner's disallowance of depreciation on a 17-story building located at 8th and Chestnut Streets, St. Louis, Missouri, known as the International Building, for the years 1943, 1944 and 1945, and from the dis-

allowance of attorneys' fees paid during the year 1944 in connection with a reorganization proceeding of the taxpayer corporation in the United States District Court under Chapter X of the Federal Bankruptcy Act. The material facts follow:

In 1906 and 1907 the office building in question was erected. At that time it was completed only to the extent of six stories. Later, eleven stories were added. The building was erected upon leased premises, the lease extending for a period of 99 years from December 27, 1905. In 1913 the taxpayer corporation was formed as a subsidiary of the Missouri Lincoln Trust Company. On April 14, 1913, the taxpayer acquired the leasehold by deed recorded May 1, 1913. The consideration for the acquisition of the building stated in the taxpayer's minutes was all of its authorized common stock, consisting of 6,000 shares of common stock of a par value of \$50 per share, and \$300,000 face value first mortgage bonds. The only asset of the taxpayer was the building on the leasehold. May 1, 1913, is the base period for the fixing of the valuation for depreciation in this cause.

Beginning in 1920 the taxpayer claimed a basis for depreciation on the building of \$860,000. This claim was based upon an alleged acquisition cost by taxpayer of \$600,000, consisting of 6,000 shares of stock at \$50 per share, equalling \$300,000, and \$300,000 face value 6 per cent mortgage bonds, totaling \$600,000, plus \$260,000 which it was alleged had been expended in the construction of the top eleven stories after taxpayer's acquisition of the building. This claimed valuation for depreciation was continued in the taxpayer's return from 1920 to 1939, inclusive. After 1939 the taxpayer claimed an additional value of \$10,383 for additional capital invested in additions and betterments. Thereafter the claimed valuation for depreciation purposes was \$870,383.

The Commissioner assessed a deficiency in income tax for the year 1933 against the taxpayer upon a determination then made by him that the value of the leasehold for depreciation purposes was \$385,000 on May 1, 1913. Taxpayer filed a petition for review of this assessment with the Board of Tax Appeals and continued to make its returns as above noted, upon the basis of a valuation for depreciation of \$860,000. Again for the years 1938 and 1939 the Commissioner assessed a deficiency in the taxpayer's income tax on the basis that the value of the leasehold for depreciation purposes was \$385,000 on May 1, 1913. The taxpayer again filed a petition to review these later assessments with the Board of Tax Appeals. In these petitions for review the taxpayer contended that the value of the building for depreciation purposes was \$860,000. That appears to have been the only issue involved in those proceedings. On October 11, 1944, both of the appeals to the Board of Tax Appeals were settled by stipulations. Those stipula-

tions and the order which the taxpayer now claims to have been a final judgment finally determining the value of the building for depreciation purposes at \$860,000 are set out in the margin.¹ In

1
"EXHIBIT C.

(Filed in the Tax Court of the United States on October 11, 1944.)
THE TAX COURT OF THE UNITED STATES.

Docket No. 104020
INTERNATIONAL BUILDING COMPANY, *Petitioner*,
v.
COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

STIPULATION:

It is hereby stipulated that there is no deficiency in Federal income tax due from the Petitioner for the taxable year 1933 and that the following statement shows the petitioner's Federal income tax liability for the taxable year 1933:

Tax liability	None
Assessment (Jeopardy):	
January 23, 1942 (not paid)	\$2,188.12
Assessment to be abated	\$2,188.12

WM. M. FITCH,
MALCOLM F. FRANK,
Counsel for Petitioner.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

EXHIBIT C-1

THE TAX COURT OF THE UNITED STATES.
WASHINGTON.

Docket No. 104020
INTERNATIONAL BUILDING COMPANY, *Petitioner*,
v.
COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

DECISION.

Under written stipulation signed by counsel for the parties in the above entitled proceeding and filed with the Court on October 11, 1944, it is Ordered and Decided: That there is no deficiency in income tax for the calendar year 1933.

J. E. MURDOCK,
Judge.

Enter:
Entered Oct. 17, 1944:

EXHIBIT D.

(Filed in the Tax Court of the United States on October 11, 1944.)
THE TAX COURT OF THE UNITED STATES.

Docket No. 105807
INTERNATIONAL BUILDING COMPANY, *Petitioner*,
v.
COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

STIPULATION:

It is hereby stipulated that there are no deficiencies in Federal income tax due from the petitioner for the taxable years 1938 and 1939 and that the fol-

neither of these cases before the Board of Tax Appeals was any hearing held or argument made upon the issues. No stipulation of facts was entered, no evidence was received, no briefs were filed. The trial court held that the order of the Board of Tax Appeals is not res judicata in this action; the taxpayer contends otherwise.

Another disputed question on this appeal arises out of the disallowance by the Commissioner for the year 1944 of the sum of \$6,360 claimed by the taxpayer as a deduction for legal fees. In November, 1941, an action was instituted for the foreclosure of the \$300,000 first mortgage bonds on the building in question. On November 12, 1941, the taxpayer filed a petition in the United States District Court at St. Louis under Chapter X, for reorganization in order to protect the property from foreclosure. A reorganization was effectuated. The District Court allowed the above amount as attorney fees to the attorneys for the bondholders, the attorney for the indenture trustee, and the indenture trustee.

Following statement shows the petitioner's Federal income tax liabilities for the taxable years 1938 and 1939:

1938	
Tax liability	None
Assessment (Jeopardy):	
January 23, 1942 (Not paid)	\$ 61.73
Assessment to be abated	\$ 61.73
1939	
Tax liability	None
Assessment (Jeopardy):	
January 23, 1942 (Not paid)	\$ 500.52
Assessment to be abated	\$ 500.52

WM. M. FITCH,
MALCOLM I. FRANK,
Counsel for Petitioner.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

EXHIBIT D-1:

THE TAX COURT OF THE UNITED STATES,
WASHINGTON.

Docket No. 105807
INTERNATIONAL BUILDING COMPANY, *Petitioner,*
v.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

DECISION.

Under written stipulation signed by counsel for the parties in the above-entitled proceeding and filed with the Court on October 11, 1944, it is Ordered and Decided: That there are no deficiencies in income tax for the calendar years 1938 and 1939.

J. E. MURDOCK,
Judge.

Enter:
Entered Oct. 17, 1944.

In the trial of this case in the District Court that court was confronted with the problem of placing a value for depreciation purposes upon the building and the leasehold as of May 1, 1913. The testimony of a number of expert witnesses was taken on that question. Their opinions varied from a low of approximately \$400,000 to a high figure of approximately \$900,000, as of May 1, 1913. The Government, in addition to opinion evidence of experts, offered testimony relative to the reproduction cost new less depreciation as of May 1, 1913. It also offered in evidence the economic value as determined by the Hoskold's Formula.²

Since the property was acquired in 1913 by the payment of the 6,000 shares of common stock and the first mortgage bonds, the value of that stock as of that date was the subject of considerable testimony. The bonds having been sold for their face amount, their value was not and is not questioned. The evidence discloses that on May 14, 1913, after the taxpayer acquired the leasehold and the building, its parent company, the Missouri Lincoln Trust Company, which was also the parent company of the seller of the property to the taxpayer, credited its bond account with \$300,000 on account of the bonds the taxpayer paid for the building, and for the 6,000 shares of stock also paid by the taxpayer for the building, the Missouri Lincoln Trust Company credited its stock account with \$100,000. It appears that at that time Missouri Lincoln also charged off \$24,525 which it had in this property, in addition to the \$400,000 representing its valuation of the bonds and stock, as a loss. The trial court treated this transaction as some evidence that the value of the property was then considered to be \$400,000. On May 20, 1913, Missouri Lincoln Trust Company offered to its stockholders the 6,000 shares of stock paid by the taxpayer in part payment for the building by subscription for a limited time at \$18 per share. Only 434 shares were sold by the end of the time fixed, to wit, October 21, 1913. The evidence of this offering was received by the trial court over the objection of the taxpayer, who now contends that this evidence was improperly received because it was not a public offering and was therefore not evidence of fair market value. In 1917 the taxpayer had an argument with the Commissioner concerning the fair value of this stock in connection with its capital stock tax. The Commissioner then contended that the fair value of the stock was \$348,607 and fixed it at that figure for purposes of capital stock tax. The taxpayer contended that it was only worth \$18 per share, or \$108,000. The secretary of Missouri Lincoln Trust Company wrote a letter to the Commissioner in 1917

² Since it is questionable whether this formula applied, and since the trial court does not appear to have given it consideration in reaching its conclusion, we need not explain the formula. It does appear to have entered prominently into the valuation of \$430,000 reached by the Commissioner.

stating that the unsold shares of the taxpayer's stock had been for sale to the public at all times at \$18 a share. Only \$60 was involved in this dispute. The taxpayer paid it because of the small amount involved, but in the letter accompanying the payment continued to protest the Commissioner's valuation of \$348,607. The taxpayer now contends that the Government, having fixed the value of the stock in 1917 at that figure for capital stock tax purposes, is bound thereby and cannot now assert its value to be a different amount. In 1918 plaintiff's tax return showed the fair market value of the stock as of September, 1918, to be \$108,000. The same is true of the 1919 tax return. In the year 1919, 17 more shares of the stock were sold for \$18 a share. The 1920 tax return shows a value of \$15.33 per share. All of the remainder of the 6,000 shares of stock were sold to the present owner on April 2, 1920, for \$82,000, or \$13.67 per share.

The record further shows that in July, 1907, a subsidiary of the Missouri Lincoln Trust Company acquired this property for a consideration stated in the deed of \$775,000. This subsidiary, the West End Realty Company, defaulted in its payments on a deed of trust given to the Missouri Lincoln Trust Company at the time of the purchase of the property, and on October 7, 1908, the property was foreclosed under that deed of trust and bought in by the Nina Realty Company, another subsidiary of the Missouri Lincoln Trust Company, for the amount of \$25,000.

The net income from the property throughout the years from 1913 to 1949 was stipulated. With considerable fluctuation, that income ranged from approximately \$13,000 in 1913 to approximately \$100,000 in 1949. Indicative of the wide range of the income, particularly as bearing upon the propriety of the use of the Hoskold Formula, at intervals the net income was as follows: 1913, \$13,065.10; 1919, \$17,899.57; 1925, \$86,285.93; 1930, \$49,006.75; 1935, \$16,973.97; 1940, \$24,610.18; 1945, \$27,764.65. The building is located in a district described by the witnesses as favorable for an office building for real estate dealers and law offices. The trial court reached the conclusion upon all the evidence, much of which we have not outlined above, that the property was not worth in excess of \$430,000 on May 1, 1913. From an examination of the entire record, and in recognition of the wide range of the evidence on the question of value as of May 1, 1913, we have reached the conclusion that unless the Commissioner is bound by the so-called consent decree, or its valuation of the stock in 1917, the finding of the trial judge of the value of the property cannot be said to be clearly erroneous. We therefore pass to the question of res judicata and estoppel.

The general scope of the estoppel of a judgment is stated in *Tait v. Western Md. Ry. Co.*, 289 U.S. 620, 623; 53 S. Ct. 706.

"The petitioner seeks a reversal on the merits, asserting that a judgment in a suit concerning income tax for a given year cannot estop either of the parties in a later action touching liability for taxes of another year. He urges further, that, if this position is not well taken, he is not concluded by the former judgment because neither the proofs nor the parties are the same as in the prior proceeding.

"1. The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action. *Cromwell v. County of Sac*, 94 U.S. 351, 352-353; *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48; *United States v. Moser*, 266 U.S. 236, 241." See also *Guettel v. United States*, 95 F. 2d 229.

In the case at bar the parties are the same as the parties before the Board of Tax Appeals in the 1933 and the 1938-39 cases. The claim or demand is different since the present claim relates to a different tax year from those involved in the cases before the Board. *Tait v. Western Md. Ry. Co.*, *supra*; *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591. But only one issue was in dispute in the cases before the Board and that is the issue now in dispute. And although the scheme of the revenue acts is an imposition of tax for annual periods, and the exaction for one year is distinct from any other, yet—"it does not follow that Congress in adopting this system meant to deprive the government and the taxpayer of relief from redundant litigation of the identical question of the statute's application to the taxpayer's status." *Tait v. Western Md. Ry. Co.*, *supra*.

The trial court held, 97 F. Supp. 585, that without a hearing or the submission of facts to the court and a judgment on the merits there is no foundation for a judicial determination of anything, saying:

"The facts on which the stipulation³ is based covered valuation of the leasehold now in issue and the amount agreed on was the same as now claimed by plaintiff.

"Plaintiff relies on *Commissioner v. Sunnen*, 333 U.S. 591. That case holds:

"... * * * where a question of fact essential to the judgment is actually litigated and determined in the first tax

³ Upon which the order of the Board of Tax Appeals was entered.

proceeding, the parties are bound by that determination in a subsequent proceeding even though the cause of action is different. * * * And if the very same facts and no others are involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change.

"The 'Decisions' of the Tax Court relied on by plaintiff admittedly involved no hearings before the Tax Court, no facts were submitted to that Court, by stipulation or otherwise, consequently there were no issues presented for the Court to decide. Without a judgment on the merits there is no foundation for a judicial determination of anything. Res adjudicata obviously cannot attach to such a proceeding. While the Tax Court entitled its memorandum 'Decision', it was nothing more than an order confirming an agreement of counsel. There was no decision on any fact or issue.

"And a decision of that kind rendered by the Tax Court will not support a plea of estoppel in a case of this nature involving liability for income tax for a different year. *Blaffer v. Commissioner*, 5 Cir., 134 F. 2d 389; *Hurtford-Empire Co. v. Commissioner*, 2 Cir., 137 F. 2d 540; certiorari denied, 320 U.S. 787, 64 S. Ct. 196, 88 L. Ed. 473; *Riter v. Commissioner*, 3 T.C. 301. [Trapp v. United States (10th Cir.), 177 F. 2d 1, 5.]"

In the *Sunnen* case, referred to above, the Supreme Court said with reference to those cases where the cause of action was different:

"Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, *res adjudicata* is usually and more accurately referred to as estoppel by judgment, or collateral estoppel. See Restatement of the Law of Judgments, Secs. 68, 69, 70; Scott, 'Collateral Estoppel by Judgment,' 56 Harv. L. Rev. 1."

We do not understand that the Supreme Court meant by saying that "if the very same facts and no others are involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive * * *," that proffered evidentiary facts had to be the same to bring about that result, but rather that the

ultimate facts for determination in both cases had to be identical. As stated in *Cromwell v. County of Sac*, 94 U.S. 351, 24 L. Ed. 195:

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

And in *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U.S. 683, 39 L. Ed. 859, the Supreme Court said of a default judgment:

"The essence of estoppel by judgment is that there has been a judicial determination of a fact, and the question always is, has there been such a determination, and not upon what evidence or what means was it reached."

Of course, if consent decrees are to be given effect as res judicata it must follow that the similarity of the ultimate fact or issue is alone necessary, since very frequently consent decrees and judgments are entered on stipulation without a recitation of the facts upon which the agreement was reached. Hence for the purposes of this case we pass to the consideration of the effect of consent decrees in applying the rule of res judicata.

In the early case of *Cromwell v. Sac County*, *supra*, we find language which may be the origin of later expressions of various courts of high respect and authority which may appear conflicting. Recognizing the practical considerations which frequently actuate litigants in not contesting issues and the unfairness of holding one barred by estoppel of judgment from contesting an issue in a later case involving a different cause of action which was not actually contested in previous litigation between the same parties, the court said:

"Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon con-

siderations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction. A judgment by default only admits for the purpose of the action the legality of the demand or claim in suit. It does not make the allegations of the declaration or complaint evidence in an action upon a different claim. The declaration may contain different statements of the cause of action in different counts. It could hardly be pretended that a judgment by default in such a case would make the several statements evidence in any other proceeding. *Boyleau v. Rutlin*, 2 Exch. 665, 681; *Hughes v. Alexander*, 5 Duer, 493."

And in *O' Cedar Corporation v. F. W. Woolworth Co.* (7th Cir.), 66 F. 2d 363, the court recognizes the difficulty in determining the scope of a consent decree, and especially in trade-mark cases because of the lack of identity of descriptive words used in cases of latter type; but goes on to say:

"The scope of a decree of this character embodying an agreement of the parties is generally involved in some doubt, because of lack of identity of the descriptive words used. Generally speaking, it may be said that as between parties sui juris and in the absence of fraud, a decree of a court having jurisdiction of the subject matter rendered by consent of the parties, though without any ascertainment by the court of the truth of the facts averred, is as binding and conclusive between the parties and their privies as if the suit had been an adversary one. So construing the decree in the previous litigation between appellant and appellee Woolworth, we cannot escape the conclusion that the court found the use of the words 'cedar oil' as modifying 'polish' to be an infringement of plaintiff's trade-marks and also that they constituted unfair trade practices. From the position by it taken and the decree entered thereon, appellee Woolworth Company cannot now withdraw."

In *Woods Bros. Const. Co. v. Yankton County*, S. D., 54 F. 2d 304, this court held:

"That it was a judgment based upon an agreed statement of facts, or if it could be considered a consent judgment, does not lessen its force or effect. Of course, jurisdiction cannot be conferred by consent and there was no attempt here so to do. We quote from 34 Corpus Juris, p. 133, Sec. 335, as to a consent judgment: 'But at the same time, as it has the sanction of the court, and is entered as its determination of the controversy, it has the same force and effect as any other judgment, and in the absence of fraud or mistake is valid and bind-

ing, as such, as between the parties thereto and their privies, and is not inactivated by subsequent failure to perform a condition on which the consent was based, or by the fact that it obligates the parties to do that which they could not make a valid contract to do; and unless it is vacated or set aside in the manner provided for by law, it stands as a final disposition of the rights of the parties thereto.' "

The Court of Appeals for the Tenth Circuit had the question under consideration in *Continental Petroleum Co. v. United States*, 87 F. 2d 91, a tax case, in which there had been an order entered on stipulation by the Board of Tax Appeals. That Court said:

"An order of redetermination, from which no petition for review is timely filed, made in a proceeding in which the Board has jurisdiction of the subject-matter and parties, is conclusive upon the parties and they cannot litigate the issues anew in a separate action in court. *Tait v. Western Maryland Ry. Co.*, 289 U.S. 620, 53 S. Ct. 706, 77 L. Ed. 1405; *Bankers' Reserve Life Co. v. United States* (Ct. Cl.), 44 F. 2d 1000, certiorari denied 283 U.S. 836, 51 S. Ct. 485, 75 L. Ed. 1448; *Brampton Woolen Co. v. Field* (C.C.A.) 56 F. 2d 23, certiorari denied 287 U.S. 608, 53 S. Ct. 12, 77 L. Ed. 529."

In *Rector v. Suncrest Lumber Co.*, 4 Cir., 52 F. 2d 946, the court said:

"The effect of the judgment was to put an end to all litigation between the parties upon the questions determined in the earlier case. * * *. Such a judgment precluded further litigation of the issue, for a judgment entered by consent is as conclusive and final as to any matter determined as one rendered in *vitum* after contest and trial. *Pacific R. Co. v. Ketchum*, 101 U.S. 289, 25 L. Ed. 932; *U. S. v. Babbitt*, 104 U.S. 767, 26 L. Ed. 921; *Nashville C. & St. L. R. Co. v. U. S.*, 143 U.S. 261, 266, 5 S. Ct. 460, 28 L. Ed. 971; *Utah Power & Light Co. v. U. S.* (Ct. Cl.), 42 F. 2d 304, 308; *McGowan v. Parish*, 237 U.S. 285, 35 S. Ct. 543, 59 L. Ed. 955; *Swift & Co. v. U. S.*, 276 U.S. 311, 48 S. Ct. 311, 72 L. Ed. 587. And such a judgment cannot be impeached collaterally in another proceeding. *City of Helena v. U. S.* (C.C.A.), 104 F. 113; *Cox v. Md. Elec. Rys. Co.*, 126 Md. 300, 95 A. 43; *Morris v. Patterson*, 180 N.C. 484, 105 S.E. 25; *Watts v. Alexander, Morrison & Co.* (D.C.), 34 F. 2d 66."

In *United States v. Radio Corporation of America*, 46 F. Supp. 654, Circuit Judge Maris, sitting as a District Judge, held:

"A consent decree, although based upon an agreement of the parties rather than a finding of facts by the court, is not

a mere authentication or recording of that agreement. It is a judicial act (*United States v. Swift & Co.*, 286 U.S. 106, 115, 52 S. Ct. 460, 76 L. Ed. 999) and, therefore, involves a determination by the chancellor that it is equitable and in the public interest."

In *Snell v. Turner Lumber Co.*, 2 Cir., 285 F. 356, the court held that the former decree by consent "does not take away from its effectiveness as binding and conclusive; just as it would be after a trial on the merits."

Judge Hickenloper, writing for the court for the Sixth Circuit, said in *Warner v. Tennessee Products Corp.*, 57 F. 2d 642:

"It is conceded by the defendant, and in view of the authorities the rule could not well be otherwise, that this adjudication in 1924, although by consent, constitutes an estoppel by judgment binding upon the parties or their privies, and that all questions of law and fact distinctly put in issue and determined by the decree cannot be disputed in a subsequent suit between such parties or their privies. *Southern Pacific R. Co. v. U. S.*, 168 U.S. 1, 18 S. Ct. 18, 42 L. Ed. 355; *Nashville, C. & St. L. R. Co. v. U. S.*, 113 U.S. 261, 5 S. Ct. 460, 28 L. Ed. 971; *Ingraham Co. v. Germanow*, 4 F. 2d 1002 (C.C.A. 2); *Vapor Car Heating Co. v. Gold Car Heating & Lighting Co.*, 7 F. 2d 284, 287 (C.C.A. 2)."

This court, consisting of Judges Stone, Walter H. Sanborn, and Munger, said in *Roberts Cone Mfg. Co. v. Bruckman*, 266 F. 986:

"Consent decrees as to validity, scope, and infringement in patent cases are regarded as constituting no adjudication of such matters which will affect other than the parties consenting thereto. But they are intended by the parties to control their rights in respect to the matters covered thereby, and they do have that effect. The method of enforcing this result is by estopping either party from denying the binding effect of the decree so procured. When, as here, a patent is, in a consent decree, adjudged valid, and infringed by a certain machine, that decree has, as between those parties, settled that that patent is valid, and that machine is an infringement. When thereafter complainant desires by a supplemental bill to extend the relief to another machine, which he claims is essentially the same as the one held to be an infringement, the issue thus presented is whether, in the light of the patent as valid, the new machine is essentially the old infringement."

In the case of *Ingraham Co. v. Germanow*, 4 F. 2d 1002, a consent decree was entered declaring a patent valid and infringed.

Later in an action between other parties the patent was held invalid. After the court in the other case held the patent invalid, the defendant in the first action refused to be bound by the consent decree. In a subsequent action to enforce the consent decree the court said:

"We do not see how the defendants can take advantage of the decision of this court in the later suit, to which they were not parties. The decree entered upon their consent is a good estoppel, though the issues were not litigated, and while it stands they are as much bound by it as though the later suit had never been brought. *Central Life Securities Co. v. Smith*, 236 F. 170, 149 C.C.A. 360 (C.C.A. 7); *Pooler v. Hyne*, 213 F. 154, 159, 129 C.C.A. 506 (C.C.A. 7)."

It should be noted further that the Supreme Court enforced a consent decree in *Swift & Co. v. United States*, 276 U.S. 311.

We direct our attention to the cases relied upon by the trial court. First the case of *Trapp v. United States*, 177 F. 2d 1. There it was unequivocally held:

"A judgment, not predicated upon stipulated facts, or upon findings of fact, or upon a determination on the merits, but merely to carry out a compromise agreement of the parties, fails to constitute an effective judicial determination of any litigated right. *Fruehauf Trailer Co. v. Gilmore*, 10 Cir., 167 F. 2d 324. And a decision of that kind rendered by the Tax Court will not support a plea of estoppel in a case of this nature involving liability for income tax for a different year. *Blaffer v. Commissioner*, 5 Cir., 134 F. 2d 389; *Hartford-Empire Co. v. Commissioner*, 2 Cir., 137 F. 2d 540, certiorari denied, 320 U.S. 787, 64 S. Ct. 196, 88 L. Ed. 473; *Riter v. Commissioner*, 3 T.C. 301."

We find no material distinction between the factual situation in the *Trapp* case and the facts in the case at bar on the question of res judicata. In order to weigh it and the several cases of like import, we look to the judicial support upon which each is based. All of the cases which the *Trapp* case cites in support of the conclusion there stated are referred to in the above quoted excerpt from that opinion.

In the case of *Fruehauf v. Gilmore*, a consent judgment had been entered for \$3,000.00 in favor of Walker against a partnership engaged in transporting gasoline, for personal injuries received by Walker from a fire caused by the driver of the partnership's truck. The partnership and its insurer then brought an action against Fruehauf for the recovery of the \$3,000.00 and attorney fees which it had paid in satisfaction of the consent judgment on the ground

that it was Fruehauf's negligence in furnishing it with a defective tanker truck in which the gasoline was transported which caused the injury to Walker. Fruehauf defended on the ground, among others, that the consent decree was *res judicata* on the question of whose negligence caused the injury, and that under that decree it was determined that the partners' truck driver was the negligent party. Fruehauf was not a party to the action resulting in the consent decree, although notified by the partners to defend it. The trial court held against Fruehauf and on appeal the court affirmed, saying:

"The judgment in the action brought by Walker was a consent judgment entered to carry out a compromise agreement. It was not based upon any findings of fact or any determination on the merits. It was not a judicial determination by the court of any litigated right. In entering it, the court merely exercised an administrative function in recording what had been agreed to between the parties. It, therefore, afforded no basis for a finding of negligence." Citing *New York Cent. & H. R. R. Co. v. Stuart & Son Co.*, 260 Mass. 242, 157 N.E. 540, 543; *Texas & Pacific Ry. Co. v. Southern Pacific Co.*, 137 U.S. 48, 56 11 S. Ct. 10, 34 L. Ed. 614; *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U.S. 552, 562, 11 S. Ct. 402, 34 L. Ed. 1005; *Cutter v. Arlington Casket Co.*, 255 Mass. 52, 151 N.E. 167, 170; *Granzow v. Village of Lyons, Ill.*, 7 Cir., 89 F. 2d 82, 86; *Wadhams v. Gay*, 73 Ill. 415, 435.

Although Fruehauf was not a party to the action in which the consent decree was entered and hence, absent the possible effect of the notice to it to defend, was not entitled to assert it as *res judicata*,⁴ the court did not base its stated conclusion on any such ground. Hence the Fruehauf case must, we think, be placed in the category with those holding that consent decrees will not support the plea of *res judicata*, and necessitates an examination of the authorities supporting it, which we shall presently do.

In *Blaffer v. Commissioner*, 134 F. 2d 389, the question for determination in the second case was held not to have been finally determined in the first (upon which the claim of *res judicata* was based) and in addition to that reason there had been an intervening construction of the applicable law by the Supreme Court contrary to that applied in the first case. Hence, the *Blaffer* case clearly falls within two recognized exceptions to the general rule—that the issue was not decided in the first case and that as stated in the *Sonnen case* (333 U.S. 1, 600), "a judicial declaration intervening between the two proceedings may so change the legal

⁴ 1. *T. S. Rubber Co. v. Essex Rubber Co.*, 270 F. 593, 698; *Granzow v. Village of Lyons, Ill.*, 89 F. 2d 83.

atmosphere as to render the rule of collateral estoppel inapplicable." For those reasons the *Blaffer* case is not authority for a holding that a consent decree will not support the plea of res judicata.

The plea of res judicata was rejected in the case of *Hartford-Empire Co. v. Commissioner*, 137 F. 2d 540, for the reason that the issue presented in the second case was not determined in the former, the court saying:

"How far a decision upon a question of law can be an estoppel in a later action upon a different cause of action is a vexed question, but no one has ever suggested that it can extend to matters not actually litigated."

For that reason we do not consider that case authority on the question before us.

The Tax Court in *Riter v. Commissioner*, 3 T.C. 301, adopted the rule that consent judgments will not support the plea of res judicata. We note, however, in the dissenting opinion on the question there is cited the case of *Hot Springs Coal Co. v. Miller*, 107 F. 2d 677 (10 Cir.), wherein a judgment entered upon a stipulation was enforced as res judicata, the court saying:

"Any disposition of a pending action, not illegal, may be fairly agreed to by the parties, and if approved by the court, it should permit such disposition and enter judgment accordingly, and such judgment will be valid and binding upon the parties and their privies. 34 C.J., page 130, Sec. 332; *United States v. Parker*, 120 U.S. 89, 7 S. Ct. 454, 30 L. Ed. 601; *Burgess v. Seligman*, 107 U.S. 20, 2 S. Ct. 10, 27 L. Ed. 359; *Harniska v. Dolph*, 9 Cir., 133 F. 158; *Simmons v. Baynard*, C.C., 30 F. 532."

Directing our attention to the cases cited in support of the conclusion stated in the *Fruchauf* case: *New York Cent. v. Stuart*, 260 Mass. 242, 157 N.E. 540, involved a consent decree entered after trial and reversal. The court stated in its opinion that it did not establish anything on the merits, that it was unnecessary to consider the merits in order to enter it, that it was not a judicial determination by the court of any litigated right and was not binding on the party against whom it was offered because it was not acquiesced in by that party—who was not a formal party to the action or the decree. We find no holding in this case to the effect that consent decrees sui generis will not support the plea of res judicata. But the case of *Cutter v. Arlington Casket Co.*, 255 Mass. 52, 151 N.E. 167, does definitely hold that a consent decree "does not necessarily" conclude the parties to it, and is not in itself res judicata "of the facts put in issue on the bill and answer,

because such facts were not determined on judicial consideration."

We find that the cases of *Texas & Pacific Ry. Co. v. Southern Pacific Co.*, 137 U.S. 48, and *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U.S. 552, were cited as authority in support of the theory that consent judgments would not support the plea of res judicata in *Utah Power & Light Co. v. United States*, 42 F. 2d 304, and there distinguished. In the *Texas & Pacific* case the Supreme Court pointed out that the issue involved in the second case had been found by the lower court⁵ not to have been involved in the case relied upon in support of the claim of res judicata and acquiesced in that finding. For that reason it was held that the earlier decision did not support the plea of res judicata upon the well recognized ground that the point in issue had not been previously decided in the previous action involving a different cause of action. The Supreme Court did say, however:

"The decrees were entered by consent, and in accordance with the agreement, the courts merely exercising an administrative function in recording what had been agreed to between the parties, and it was open to the Supreme Court of Louisiana to determine, upon general principles of law, that the validity of Article VI was not in controversy or passed upon in the causes in which the decrees were rendered. In doing so, that court did not refuse to give due effect to the final judgment of a court of the United States or of another State."

This expression furnishes a reason for the citation of the case on the question now involved. But in our judgment it furnishes a better reason for the recognized principle that judgments not involving the same cause of action, and especially consent judgments of that character, should be used in support of the claim of res judicata with great care, to the end that a question not be held to have been decided and settled which was not actually an issue in the former proceeding.

The *Lawrence Mfg. Co.* case illustrates another exception to the general rule—that where a party returns to a court of chancery to enforce relief previously awarded by a consent decree, it is at the risk of reopening the former decree. The court said in the *Lawrence* case:

"But where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill. Hence, even if it be assumed upon the evidence that the decree against the old corporation bound the new one, yet this being in effect, in one of the two aspects, and,

⁵In that instance the Supreme Court of Louisiana.

perhaps, the sole aspect, in which it is framed, a bill to carry the former consent decree into execution, the Circuit Court was not obliged to do so if it believed that decree erroneous; and that it was erroneous we have already decided. Inasmuch as plaintiff came into a court of equity to have the benefit of the former decree, the court was at liberty to inquire whether circumstances justified the relief."

The court observes that this rule was discussed and applied in *Wadhams v. Gay*, 73 Ill. 415, which latter case was one of the cases cited in the *Fruehauf* case. Digressing briefly for the purpose of further referring to *Wadhams v. Gay*, it should be noted that in *Gay v. Parpart*, 106 U.S. 679, the same decree involved in *Wadhams v. Gay* was held by the Supreme Court to have been incomplete, lacking finality, and for that reason was not a proper basis for res judicata. But in the *Lawrence* case, as in the *Texas & Pacific Ry.* case, the court goes on to say:

"The prior decree was the consequence of the consent and not of the judgment of the court, and this being so, the court had the right to decline to treat it as res adjudicata; *Wadhams v. Gay*, *Gay v. Parpart*, *supra*; *Jenkins v. Robertson*, L.R. 11 Se. App. 117; *Brownsville v. Loague*, 129 U.S. 493, 505; *Texas & Pacific Railway v. Southern Pacific Co.*, 137 U.S. 48, 56; *Edgerton v. Muse*, 2 Hill Eq. (So. Car.) 51; *Lamb v. Gatlin*, 2 Dev. & Batt. Eq. 37; *Bean v. Smith*, 2 Mason, 252."

Again we find apparent basis for the reasoning of the *Trapp* and *Fruehauf* cases.

Granzow v. Village of Lyons, Ill., 89 F. 2d 83, heretofore cited in a footnote, was cited in the *Fruehauf* opinion. In the *Granzow* case the receiver of a national bank made a settlement with the City of Lyons by which it was agreed that the city might sell securities pledged by the bank to the city to secure the city's deposits in the bank and apply the proceeds of the sale on the bank's debt to the city. The receiver went to the court administering the liquidation proceedings and procured an order permitting the city to do as the agreement provided. The city was not a formal party to the liquidation proceedings. The order was made ex parte as a routine order in the usual course of administration. Later the courts held that the pledge of assets was invalid under Illinois law. In a subsequent action by the receiver to recover from the city the proceeds of the sale, involving a different cause of action, the court denied the plea of res judicata interposed by the city. Clearly the situation fell within the exception created by an intervening judicial declaration, above noted, stated in the *Sunnen* case. The *Granzow* opinion expressly points out that there was no showing

that the court had jurisdiction of the city, that there was no showing that the court was dealing with anything but an *ex parte* proceeding, no showing of an adjudication between the parties or that the city was a party and bound within the meaning of the doctrine of *res judicata*, no showing that there was a suit, in the legal sense and parties in the legal understanding of the term. It was then stated unequivocally that—"No issue was adjudicated" (in the earlier order). Adequate grounds obviously existed for refusing to treat the order as *res judicata*. But the court then said:

"The order was the consequence of consent and not of judgment of the court. Consequently it could not be treated as *res adjudicata*." Citing the *Lawrence Mfg. Co.* case, *supra*, heretofore examined, and *San Francisco v. LeRoy*, 138 U.S. 656, 11 S. Ct. 364, 34 L. Ed. 1096.

The claim of *res judicata* in the *San Francisco-LeRoy* case was denied upon the sole ground that the attorney agreeing to the consent decree did not have authority to do so.

Demonstratively, we find authoritative support for the statement in the *Trapp* and *Fruehauf* cases that consent judgments will not support a plea of *res judicata*. But we note that in several instances, notably in the Seventh Circuit, when the question has been necessary to the determination of the cause before it, the court has given effect to a consent decree as a basis for the plea, although in other cases language has been used which on first impression tends to leave a contrary impression.

Our hesitancy to disagree with the Tenth Circuit should be demonstrated by the extent of our research on this question. But we respectfully observe that if we followed *Trapp v. United States* and *Fruehauf v. Gilmore*, it would be necessary for us to disagree with that court's holding in *Continental Petroleum Co. v. United States*, *supra*. From our somewhat extensive research on the question we are constrained to hold and do hold that under proper circumstances consent decrees will support a plea of *res judicata* and that the plea is good under the circumstances of this case. Whether a consent decree would support the plea of *res judicata* under circumstances less compelling than exist in this case we need not determine. But here the parties dealt at arm's length. They threshed out the facts. They agreed upon the basis for depreciation as of a date long past, after extensive and deliberate negotiations. That fact in dispute—the actual fair value of the building on May 1, 1913—was the same at all times regardless of the different opinions which may have existed prior to the agreement, stipulation and decree, or which may exist now. There has been no change in the law or its interpretation. In the language of the *Sunnen* case as quoted in *Commissioner of Internal Revenue v.*

Texas-Empire Pipe Line Co., 176 F. 2d 523 (10 Cir.), "Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel."

Where the action involves a different cause of action, a consent judgment should be used with caution, and adequate care must be taken to be sure that the question involved in the later action was actually in issue and its determination actually embraced in the consent decree. But when that is true such a decree should not be cast aside and the agreement embodied in it ignored, merely because it was a consent decree.

Were the attorneys' fees, paid at the court's order in the reorganization proceedings, properly deductible as ordinary and necessary expenses paid in carrying on the taxpayer's business within the meaning of the pertinent provisions of Sec.23(a)(1) of the Internal Revenue Code—

"* * * In computing net income there shall be allowed as deductions * * * all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *."

They were not. *Motion Picture Capital Corp. v. Commissioner of Internal Revenue*, 80 F. 2d 872; *Skenandon Rayon Corp. v. Commissioner of Internal Revenue*, 122 F. 2d 268.

The conclusion reached on the questions determined above makes it unnecessary to consider other points set forth in the briefs. The action of the trial court in holding that the consent judgments of the Board of Tax Appeals were not res judicata on the question of valuation for depreciation purposes is reversed. In all other respects the judgment of the trial court is affirmed and the cause is remanded for further proceedings consistent with this opinion.

: (Judgment.)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14465—September Term, 1952

Friday, September 19, 1952

INTERNATIONAL BUILDING COMPANY, a Corporation, Appellant,

-v-

UNITED STATES OF AMERICA

*Appeal from the United States District Court for the Eastern
District of Missouri.*

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here Ordered and Adjudged by this Court, that the action of the said District Court in holding that the consent judgments of the Board of Tax Appeals were not res judicata on the question of valuation for depreciation purposes be, and is hereby, reversed. And it is further Ordered by this Court that in all other respects the judgment of the said District Court be, and is hereby, affirmed, and this cause is hereby remanded for further proceedings consistent with the opinion of this Court this day filed herein.

September 19, 1952.

(Clerk's Certificate.)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the printed record on which the appeal from the United States District Court for the Eastern District of Missouri was heard in said Court of Appeals, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Court of Appeals for the Eighth Circuit, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Court of Appeals wherein International Building Company, a Corporation, was Appellant, and the United States of America was Appellee, No. 14465.

I do further certify that on the 8th day of October, A. D. 1952, a mandate was issued out of said Court of Appeals in said cause,

directed to the Judges of the United States District Court for the Eastern District of Missouri.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, on the 1st day of December, A. D. 1952.

[SEAL]

E. E. KOCH

*Clerk of the United States Court of
Appeals for the Eighth Circuit*

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DEC 17 1952

No. 508

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, PETITIONER

v.

**INTERNATIONAL BUILDING COMPANY,
A CORPORATION**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 508

UNITED STATES OF AMERICA, PETITIONER

v.

INTERNATIONAL BUILDING COMPANY,
A CORPORATION

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit entered in the above-entitled case on September 19, 1952.

OPINIONS BELOW

The memorandum opinion of the District Court (R. 178-185) is reported at 97 F. Supp. 595. The opinion of the Court of Appeals (R. 206-224) is reported at 199 F. 2d 12.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1952 (R. 225). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

The Commissioner assessed deficiencies against the taxpayer for the taxable years 1933, 1938, and 1939, determining that the taxpayer had claimed an excessive value as its basis for depreciating certain property and was amortizing this basis over too short a period. The taxpayer filed petitions for redetermination by the Tax Court of these deficiencies. Without further proceedings, the Commissioner and the taxpayer filed stipulations in the Tax Court that there were no deficiencies for the years in question. No facts were stipulated, no hearings were held, and no issues were presented for decision by the Tax Court, which, pursuant to the stipulations, entered decisions that there were no deficiencies. The question presented is whether these decisions, on the principle of *res judicata* or estoppel by judgment, preclude the Government from showing in a subsequent suit by the taxpayer for recovery of deficiency taxes for later taxable years that the proper basis for depreciation of taxpayer's property is lower than the basis claimed in 1933, 1938, and 1939.

STATEMENT

This action was brought by respondent corporation (the taxpayer) to recover deficiency taxes paid for the years 1943, 1944, and 1945 (R. 31). The only disputed item material to this petition is the disallowance by the Commissioner of

claimed deductions for depreciation. The facts, as stipulated by the parties (R. 31-93) and found by the district court (R. 186-187), may be summarized as follows:

The taxpayer corporation was organized under the laws of the State of Missouri on April 14, 1913 (R. 34). In exchange for all of its authorized capital stock and bonds issued on May 1, 1913, taxpayer acquired a leasehold expiring December 31, 2004, of a plot of ground, together with a building which had been erected thereon by the lessee (R. 34, 36).

From its acquisition of the leasehold on May 1, 1913, to December 31, 1919, taxpayer claimed no depreciation in its tax returns. From 1920 through 1942 taxpayer claimed total depreciation deductions of \$412,848.92, the amounts claimed for the years 1920 through 1939 being computed on a depreciable basis of \$860,000, and subsequent to 1939 on a basis of \$870,383 (R. 38-39, 42).

For the years 1933, 1938, and 1939, the Commissioner assessed deficiencies in taxpayer's income taxes. In his deficiency determinations for these years, the Commissioner valued the leasehold for depreciation and amortization purposes at \$385,000, as of May 1, 1913, and determined that this amount, less depreciation already taken, was to be amortized over the remaining life of the lease (R. 44-45). The taxpayer, in two petitions, for review by the Board of Tax Appeals (now the

Tax Court) of these deficiency assessments, alleged, as does the complaint in the present suit (R. 7-15), that the value of the building on May 1, 1913, was \$860,000 and that this value should be depreciated over the remaining life of the building, 45 years from May 1/1913 (R. 45):

Before any further action had been taken in the Tax Court proceedings, taxpayer on November 12, 1941, filed a petition under Chapter X of the Federal Bankruptcy Act in the United States District Court for the Eastern District of Missouri. In this proceeding, the Collector of Internal Revenue filed proof of claim for the deficiencies in taxes for 1933, 1938, and 1939, along with a claim for additional taxes for 1941 (R. 45). On October 7, 1944, a stipulation was filed in the bankruptcy proceeding by which the Government withdrew its claim for additional taxes and interest for 1933, 1938, 1939, and 1941 (R. 46, 51).² This stipulation provided (R. 51):

It is * * * Stipulated and Agreed by and between the parties hereto that the withdrawal of said Amended Claim by the United States is without prejudice and does not constitute a determination of the merits and does not prejudice the rights or remedies of the United States for the collection of Internal Revenue taxes that may be due with respect to any year other than those involved in said Amended Claim, namely, the years of 1933, 1938, 1939 and 1941.

On October 11, 1944, the taxpayer and the Commissioner filed stipulations in the pending review proceedings in the Tax Court that there were no deficiencies for the years 1933, 1938, and 1939 (R. 46, 51-52, 54). The Tax Court held no hearing; there was no argument; no stipulation of facts was entered into; and no briefs were filed (R. 46). On October 17, 1944, pursuant to the stipulations, the Tax Court entered decisions that there were no deficiencies in income taxes for 1933, 1938, and 1939 (R. 46, 52, 54). It is these decisions which give rise to the problem of collateral estoppel in the present action involving the years 1943, 1944, and 1945.

In the present action, seeking recovery of deficiency taxes paid for the years 1943, 1944, and 1945, the taxpayer claimed that \$860,000 was the correct valuation of its building on May 1, 1913, and that this amount was properly to be amortized over the 45-year life of the building. The Commissioner, determining that the taxpayer's basis for depreciation (the fair market value of the building on May 1, 1913) was \$430,000, and finding that allowed and allowable deductions for years prior to 1943 had exceeded this basis, had disallowed claimed deductions and assessed the deficiencies in question (R. 42).

The district court, agreeing with the Commissioner, found as a fact that the value of the leasehold as of May 1, 1913, did not exceed \$430,000

(R. 187). On the taxpayer's appeal, the court below approved this finding (R. 211).

The district court also rejected taxpayer's contention (R. 7-8, 15-16, 46) that the Tax Court's decisions pursuant to stipulation of "no deficiency" for the years 1933, 1938, and 1939 estopped the Commissioner from asserting that the basis for depreciation was less than \$860,000. Pointing out that the Tax Court's decisions had been entered without hearings, that no facts had been presented to that court, by stipulation or otherwise—that there had been, in short, "no issues presented for the Court to decide"—the district court concluded that neither of those decisions had been anything "more than an order confirming an agreement of counsel" (R. 179-180). On this issue, the court below reversed. It held that in stipulating for the prior Tax Court decisions, the parties had "threshed out the facts" and "agreed upon the basis for depreciation" (R. 223). Recognizing that its holding conflicted with *Trapp v. United States*, 177 F. 2d 1 (C. A. 10), certiorari denied, 339 U. S. 913, the court concluded that the stipulated decisions of the Tax Court established for all subsequent years the taxpayer's basis for depreciation of its leasehold and precluded litigation of that issue in the present suit (R. 218, 223-4).

REASONS FOR GRANTING THE WRIT

As the court below acknowledges (R. 218, 223), its decision is in square conflict with the decision of the Court of Appeals for the Tenth Circuit in *Trapp v. United States*, 177 F. 2d 1, certiorari denied, 339 U. S. 913. While the court below views it as being distinguishable (R. 220), we believe *Hartford-Empire Co. v. Commissioner*, 137 F. 2d 540 (C. A. 2), is also in conflict with the decision here. Disagreeing with the view of the Tax Court itself—that its form decision¹ pursuant to stipulation affecting one taxable year, where no legal or factual issues are presented or determined, merely serves to carry out “an agreement of the parties to settle their * * * controversy for undisclosed reasons satisfactory to themselves,” and will not sustain a plea of estoppel by judgment as to issues presented for other taxable years, *Riter v. Commissioner*, 3 T. C. 301, 305—the decision below departs from principles stated by this Court in *Commissioner v. Sunnen*, 333 U. S. 591, 597-598, 599-600, and *Tait v. Western Md. Ry. Co.*, 289 U. S. 620, 623, 626. The decision below, rejecting the position of the Bureau of Internal Revenue, approved by the Tax Court, that the many cases settled by stipulated decisions of this kind, affect

¹ For stipulated decisions of the type involved here, the Tax Court employs a standard form which requires only that the case number, the names of the parties, and the stipulated deficiency, if any, be entered.

only the taxable years directly involved, presents an important question in the administration of the tax laws which should be resolved by this Court.

1. Contrary to the decision below, the Court of Appeals for the Tenth Circuit held in *Trapp v. United States*, 177 F. 2d 1, certiorari denied, 339 U. S. 913, that the doctrine of estoppel by judgment could have no application where the prior Tax Court decision for prior taxable years alleged to effect the estoppel was entered pursuant to stipulation—with no stipulation of facts, no hearing, and no issues of any kind presented for actual litigation.² That holding, like the holding in *Hartford-Empire Co. v. Commissioner*, 137 F. 2d 540 (C. A. 2), which we think is also in conflict

² The court below suggests (R. 223) that the *Trapp* decision is inconsistent with the Tenth Circuit's earlier decision in *Continental Petroleum Co. v. United States*, 87 F. 2d 91, certiorari denied, 300 U. S. 679. The latter case, however, decided only that a decision of the Tax Court of which no review was sought was *res judicata* in the strict sense of that term—i. e., that it prevented relitigation by the taxpayer in a new action of the same claim for the same taxable year. The wholly different problem here is one of determining whether a Tax Court decision pursuant to stipulation concludes issues not actually litigated when such issues are posed in suits on other causes of action for other taxable years. Overlooking this distinction, the court below invokes in support of its conclusion other cases which involved attempts to relitigate (1) the same cause of action between the same parties, (2) matters actually litigated in the prior suit, or (3) issues involved in consent judgments based upon specific stipulations expressly resolving such issues.

with the decision below, accords with this Court's declaration in *Commissioner v. Sunnen*, 337 U. S. 591, that where, as here, a different cause of action is involved, the taxable years being different (333 U. S. at 598)—

the judgment in the prior action operates as an estoppel, *not as to matters which might have been litigated and determined*, but "only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered." *Cromwell v. County of Sac*, *supra* [94 U. S. 351], 353. [Emphasis added.]⁴

³ The opinion below briefly dismisses as distinguishable the *Hartford-Empire* decision after quoting from it the following language of Judge Learned Hand (R. 220):

"How far a decision upon a question of law can be an estoppel in a later action upon a different cause of action is a vexed question, but no one has ever suggested that it can extend to matters not actually litigated." [137 F. 2d at 542.]

It may be that the Court below considered *Hartford-Empire* inapposite because of the reference to "a question of law," taking the view that the present action involves instead a "question of fact." But our point is that, in the instant case, all conceivable issues which might have been posed in the earlier proceedings were "matters not actually litigated." In *Hartford-Empire*, as here, the issue implicitly abandoned by the stipulation in the prior proceedings was an issue as to the basis for depreciation of certain property of the taxpayer. Whether legal or factual, the important thing about that issue when it arose in the later action was that it had never been actually litigated so that it could not be deemed to have been determined for subsequent taxable years.

⁴ Cf. *Fruehauf Trailer Co. v. Gilmore*, 167 F. 2d 324 (C. A. 10); *Blaffer v. Commissioner*, 134 F. 2d 389 (C. A. 5).

This principle has been uniformly followed by the Tax Court in decisions preceding, as well as following, the filing in that court of the stipulations here in question: *Volunteer State Life Insurance Co. v. Commissioner*, 35 B. T. A. 491, 494-495, reversed on other grounds, 110 F. 2d 879 (C. A. 6), certiorari denied, 310 U. S. 636; *Riter v. Commissioner*, 3 T. C. 301, 305; *Pitcairn v. Commissioner*, decided May 22, 1944 (1944 P-H T. C. Memorandum Decisions, par. 44,185); *Laughlin v. Commissioner*, decided October 3, 1944 (1944 P-H T. C. Memorandum Decisions, par. 44,317). See also *Restatement, Judgments*, Section 68 and Comments *g*, *h*, and *i*.

In the prior proceedings which the court below has treated as *res judicata* here, there was no judgment on the merits, for no issues were presented for the Tax Court to decide. No hearings were held and no evidence was received. No facts were stipulated. The stipulations of "no deficiency" set forth no facts on which that conclusion was based (R. 46, 51-52, 53). The orders of the Tax Court simply recited that, pursuant to the stipulations, it was ordered and decided that there were no deficiencies for the years in question.

Far from supporting the conclusion of the court of appeals that the parties had "threshed out the facts" and "agreed upon the basis for depreciation" (R. 223), the record shows the contrary. Four days before the stipulations for the

Tax Court's decisions were executed, the Collector and the taxpayer had withdrawn by stipulation the Government's claim in the bankruptcy court for the taxes in question. This stipulation recites that it is (R. 51)—

without prejudice and does not constitute a determination of the merits and does not prejudice the rights or remedies of the United States for the collection of Internal Revenue taxes that may be due with respect to any year other than those involved * * *

Though these restrictions were not reiterated in the more laconic forms of stipulation filed with the Tax Court, the bare agreement to accept a finding of "no deficiency" affords no warrant for concluding that the parties had reached agreement on the merits of any disputed issues. What is crucial, in any event, is that no issues of any kind were presented to, or considered and resolved by, the Tax Court.

We submit, in short, that the decisions pursuant to stipulation of the Tax Court were, as that court has described such decisions, merely *pro forma* acceptances of "an agreement of the parties to settle their * * * controversy for undisclosed reasons satisfactory to themselves * * *." *Riter v. Commissioner*, 3 T. C. 301, 305. They served merely as orderly, expeditious ways of set-

ting the particular suits for the particular taxable years involved.⁵

2. The question in this case is important. Well over half the cases brought to the Tax Court are settled by stipulation.⁶ Both the Bureau of In-

⁵ Section 1117 (d) of the Internal Revenue Code, 26 U. S. C. 1117 (d), provides that "If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Tax Court dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Commissioner." In light of this provision, acceptance by the taxpayer of a mere dismissal of its petition would not carry out the intention of the parties where they have agreed to settle the dispute on the basis of no deficiency or a deficiency different from the one originally assessed by the Commissioner. Apart from this technical problem, which makes a form "decision" of the Tax Court an appropriate means of effectuating the settlement, it seems clear that the decision in such a case is no more an adjudication of any issue than would be a voluntary dismissal of the action.

⁶ In the years from 1925 through November 30, 1952, out of 151,390 cases closed, 94,293 were settled by stipulation. For the fiscal year ending June 30, 1952, the figures were 3326 stipulated in a total of 4975; for the year ending June 30, 1951, 3364 out of a total of 5055; and for the year ending June 30, 1950, 2732 out of 4125.

Among the numerous reasons, apart from the merits of the particular case, which commonly lead to stipulated decision, the following may be noted: (1) Discovery of adjustments on issues other than those originally in dispute between the taxpayer and the Commissioner which result in elimination of the asserted deficiency; (2) discovery of procedural defects or irregularities in the Commissioner's deficiency determination for the particular year or years involved; (3) the relatively small amount involved in a particular case weighed against possible expenses and difficulties of proof and the budgetary and personnel limitations under which the Bureau operates.

ternal Revenue and the Tax Court have consistently assumed that such decisions—at least where no underlying factual or legal contentions are presented to the court for resolution—affect only the particular taxable years they involve and preclude neither party from litigating in the future issues which might have been, but were not, actually litigated in the cases settled by stipulation.

Under the decision below, the thousands of cases so settled become conclusive “adjudications” of issues which they were never intended to resolve and which they did not in fact resolve. If permitted to stand, the decision will foster needless litigation in cases where administrative settlements through stipulated decisions, for reasons which frequently have nothing to do with the merits of any particular issue, would otherwise dispose of the controversies.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

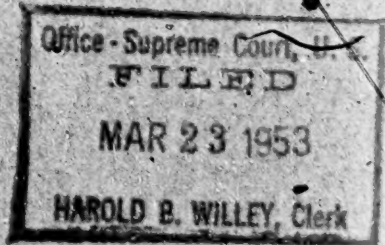
Respectfully submitted.

WALTER J. CUMMINGS, JR.

Solicitor General.

DECEMBER 1952.

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SUPREME COURT, U. S.



No. 508

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, PETITIONER
v.

INTERNATIONAL BUILDING COMPANY,
A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the District Court (R. 178-185) is reported at 97 F. Supp. 595. The opinion of the Court of Appeals (R. 206-224) is reported at 199 F. 2d 12.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1952. (R. 225.) A petition for a writ of certiorari was filed on December 17, 1952, and was granted, on February 2, 1953. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

The Commissioner assessed deficiencies against the taxpayer for the taxable years 1933, 1938, and 1939, determining that the taxpayer had claimed an excessive value as its basis for depreciating certain property. The taxpayer filed petitions for redetermination by the Tax Court of these deficiencies. Without further proceedings, the Commissioner and the taxpayer filed stipulations in the Tax Court that there were no deficiencies for the years in question. No facts were stipulated, no hearings were held, and no issues of fact or law were presented to or decided by the Tax Court, which, pursuant to the stipulations, entered formal decisions that there were no deficiencies for those years.

The question presented is whether, these decisions, on the principle of *res judicata* or estoppel by judgment, preclude the Government from showing in a subsequent suit by the taxpayer involving later taxable years that the proper basis, for depreciation and other purposes, of taxpayer's property is lower than the basis claimed in the taxpayer's petitions in the prior proceedings.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the statutes and regulations involved are set forth in Appendix A, *infra*, pp. 34-38.

STATEMENT

This action was brought by the respondent corporation (the taxpayer) to recover deficiency

assessments paid for the years 1943, 1944, and 1945. (R. 31.) The only disputed item still material in this proceeding is the basis to the taxpayer of a leasehold and 17-story building owned by it.

The taxpayer is a corporation organized under the laws of the State of Missouri on April 14, 1913. (R. 34.) In return for all of its securities—bonds in the face amount of \$300,000 and 6,000 shares of stock with a par value of \$50 each—the taxpayer on May 1, 1913, acquired a leasehold expiring December 31, 2004, of a plot of ground together with an office building erected thereon by the lessee. (R. 34, 36.)

From its acquisition of the property on May 1, 1913, until December 31, 1919, the taxpayer claimed no depreciation in its tax returns. From 1920, after the present owner acquired control, through 1942, the taxpayer claimed total depreciation deductions of \$412,848.92. The basis used for depreciation from 1920 through 1939 was \$860,000; subsequent to 1939, the figure was raised to \$870,383. (R. 38-39, 42.) The correctness of this basis is the source of this controversy.

While the basis claimed by the taxpayer had been questioned previously,¹ it was not until

¹ In 1926 the depreciable basis claimed by the taxpayer on its returns for 1920 and 1921 was questioned. However, the revenue agent in charge, under a mistaken impression of the applicable law (R. 118), allowed the basis claimed upon proof purporting to show that the building had been transferred in July 1907 for a consideration of \$714,000, and that

January 1942 that the Commissioner disallowed the basis and assessed deficiencies for 1933, 1938 and 1939, totalling \$2,750.37. (R. 52-53.) This was predicated on a basis of \$385,000 amortized over the life of the lease. (R. 44, 45.) The taxpayer filed two petitions for review with the Board of Tax Appeals (now the Tax Court), alleging that it had invested \$860,000 in the building. Of this amount, \$600,000 was claimed as the 1913 value of the securities given as consideration for the property. To this was added a further \$260,000 for alleged expenses incurred primarily in completing the top eleven floors of the building after May 1913. The total was amortized over a 45-year period. (R. 45.)

In November 1941 the taxpayer filed a petition under Chapter X of the Federal Bankruptcy Act in the United States District Court for the Eastern District of Missouri. (R. 45.) The local Collector of Internal Revenue filed proof in this proceeding of claim for deficiencies in taxes for 1933, 1938 and 1939, along with a claim for additional taxes for 1941, totalling in all \$4,883.24. (R. 45, 50.)

On October 7, 1944, the District Court issued an order confirming the taxpayer's plan for re-
between 1907 and 1913 \$165,000 had been spent to complete the top eleven floors. (R. 116-17.) In 1929, when the taxpayer's return was again questioned (R. 122-31), the claimed basis of \$860,000 was approved without further examination as "having been substantiated in prior examinations." (R. 130.)

organization. (R. 45-46.) On the same date the Government filed a stipulation in the bankruptcy proceedings withdrawing its claim. (R. 46, 50-51.) This stipulation provided, in part (R. 51):

It is * * * Stipulated and Agreed by and between the parties hereto that the withdrawal of said Amended Claim by the United States is without prejudice and does not constitute a determination of the merits and does not prejudice the rights or remedies of the United States for the collection of Internal Revenue taxes that may be due with respect to any year other than those involved in said Amended Claim, namely, the years of 1933, 1938, 1939 and 1941.

Four days later, on October 11, 1944, the taxpayer and the Commissioner filed stipulations in the then pending Tax Court proceedings that there were no deficiencies for the years 1933, 1938, and 1939. (R. 46, 51-52, 54.) The Tax Court held no hearing; there was no argument; no stipulations of facts were entered into; and no briefs were filed. (R. 46.) On October 17, 1944, pursuant to the stipulations, the Tax Court entered formal decisions that there were no deficiencies in income taxes for 1933, 1938, and 1939. (R. 46, 52, 54.)²

² The stipulation filed in the proceeding involving the year 1933 were as follows (R. 51-52):

STIPULATION

It is hereby stipulated that there is no deficiency in

Four years later, on July 20, 1948, the Commissioner assessed deficiencies in the taxpayer's income and excess profits taxes for the years 1943, 1944, and 1945, totalling \$16,297.96. (R. 178.) These assessments form the basis of the present action. The only issue still material in this proceeding is the validity of these assessments in so far as they rest on the Commissioner's reductions in the basis reported by the taxpayer in its property.³

Federal income tax due from the petitioner for the taxable year 1933 and that the following statement shows the petitioner's Federal income tax liability for the taxable year 1933:

Tax liability	None
Assessment (Jeopardy): January 23, 1942 (not paid)	\$2,188.12
Assessment to be abated	2,188.12

The decision entered thereon read (R. 52):

DECISION

Under written stipulation signed by counsel for the parties in the above-entitled proceeding and filed with the Court on October 11, 1944, it is

Ordered and Decided: That there is no deficiency in income tax for the calendar year 1933.

J. E. MURDOCK,
Judge.

The stipulation filed in the other proceeding (R. 53) and the decision entered thereon (R. 54) are identical except for the differences in the years and in the amounts involved.

³ In its complaint the taxpayer challenged the disallowance by the Commissioner of deductions in 1943 and 1945 for capital stock taxes (R. 6, 17), and a deduction in 1945 for professional fees in connection with its reorganization proceeding (R. 17). However, the first of these claims was

The basis used by the taxpayer in its returns for the years in question is \$870,383. This is the same basis claimed for 1933, 1938 and 1939, except for the addition of a \$10,383 local improvement assessment, as to which there is no dispute. (R. 40.) The Commissioner determined the taxpayer's basis to be \$430,000. (R. 42-44.) Since allowed and allowable deductions prior to January 1, 1943, had exceeded this sum by \$31,000 (R. 42), the Commissioner disallowed the deductions taken for depreciation subsequent to that date (R. 32). The disallowance of the deductions for depreciation converted the net operating loss reported for 1943 and 1944 into a profit and, consequently, eliminated the net operating loss carry-over reported by the taxpayer in 1945. (R. 32-34). Accordingly, the Commissioner also disallowed this deduction. The disallowance of these deductions for depreciation and for net operating loss carry-over is primarily responsible for the assessed deficiencies in the taxpayer's income taxes.

The reduction in the taxpayer's basis also revised the equity invested capital on which it had computed its excess profits taxes and gave rise to the deficiency in those taxes.

In this proceeding to recover the income and excess profits taxes paid on the deficiencies withdrawn by the taxpayer in the District Court. (R. 186-187.) The second was decided against the taxpayer in both courts below (R. 184-185; 224), and no question as to it is raised in this Court.

assessed by the Commissioner, the taxpayer alleged that it had acquired the building for securities whose value was \$600,000, \$300,000 in stock and \$300,000 in bonds, that it had thereafter invested \$260,000, primarily in finishing the top eleven floors of the building, and that after 1939 it had made other capital expenditures of \$10,383, giving it a total basis for depreciation of \$870,383. (R. 2-5.) The taxpayer further pleaded that the prior decisions of the Tax Court were *res judicata* of the fact that its basis is \$860,000.

The district court, agreeing with the Commissioner, held that the taxpayer's basis in its property as of May 13, 1913, was not in excess of \$430,000. (R. 188.) The court further found, as a fact, that the building had been "fully completed and finished by May 1, 1913." (R. 187.)

The district court also rejected the taxpayer's contention (R. 7-8, 15-16, 46) that the Tax Court's decisions pursuant to stipulation of "no deficiency" for the years 1933, 1938, and 1939 estopped the Commissioner from asserting that the basis for depreciation was less than \$860,000. Pointing out that the Tax Court's decisions had been entered without hearings, that no facts had been presented, by stipulation or otherwise (R. 179-180), that, in short, "there were no issues presented for the [Tax] Court to decide" (R. 180), the district court concluded that the Tax Court decisions were "nothing more than an

order confirming an agreement of counsel. There was no decision on any fact or issue." (R. 180.)

On appeal, the court below found no error in the district court's findings on the merits (R. 211), but reversed the decision on the issue of *res judicata*. It held that in stipulating for the prior Tax Court decisions the parties had "threshed out the facts" and "agreed upon the basis for depreciation." (R. 223.) It concluded that the stipulated decisions of the Tax Court established for all subsequent years the taxpayer's basis of its property and precluded litigation of that issue in the present suit. (R. 218, 223-224.)

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred in holding that the decisions of the Tax Court that there were no deficiencies in the taxpayer's taxes for the years involved in proceedings then pending before it, based solely upon the stipulations of the parties to that effect, preclude the Government, under the doctrine of collateral estoppel, from showing in a subsequent suit by the taxpayer, for recovery of deficiency taxes paid for later years, that the taxpayer's basis in certain property is lower than was claimed in the taxpayer's petitions in the prior proceedings.

SUMMARY OF ARGUMENT

This proceeding involves the effect of a judgment as an estoppel in a subsequent action be-

tween the same parties upon a different claim or demand. In reliance upon the principle of *res judicata* or collateral estoppel the court below held that the Government was concluded in this action from denying that the taxpayer's basis in certain property was \$860,000. This issue, the court concluded, had been made *res judicata* by two earlier decisions of the Tax Court, entered upon stipulations between the parties of "no deficiency," in proceedings involving income taxes for earlier years. The taxpayer in the petitions initiating the proceedings in the earlier years had alleged its basis to be that amount. In those proceedings no evidence was received, no stipulations of facts entered, no briefs filed, no hearing held, and no arguments made upon any issues of fact or law. Thousands of cases in the Tax Court have been and continue to be settled by such stipulated decisions.

The decision below is in square conflict with the decision of the Court of Appeals for the Tenth Circuit in *Trapp v. United States*, 177 F. 2d 1, certiorari denied, 339 U. S. 913, which held that decisions of the Tax Court of the character there involved will not support a plea of estoppel. Since such decisions involve no judicial determination of any litigated right, the considerations of policy underlying the doctrine of collateral estoppel have no application to them and they should not foreclose inquiry into the merits.

In so far as the decision below finds the Government concluded as to an issue which might have been litigated and determined, had the matter been allowed to proceed to judgment on the merits, but which was not in fact so determined, it departs from well-established principles governing application of the doctrine of collateral estoppel. These principles have been repeatedly applied in tax cases. There is no support for the lower court's conclusion that the parties had agreed in the prior proceedings as to the taxpayer's basis. Since this issue was not canvassed or determined in the prior proceedings, it was not concluded in this action.

ARGUMENT

A DETERMINATION ON THE MERITS OF THIS ACTION IS NOT BARRED, UNDER THE PRINCIPLE OF RES JUDICATA OR COLLATERAL ESTOPPEL, BY THE DECISIONS OF THE TAX COURT IN THE PRIOR PROCEEDINGS INVOLVING EARLIER TAX YEARS

Subsumed under the heading *res judicata* are two distinct principles with different historical roots: the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action.

Commissioner v. Sunnen, 333 U. S. 591; *Cromwell v. County of Sac*, 94 U. S. 351; *Tait v. Western*.

Md. Ry. Co., 289 U. S. 620.⁴ It is the second and far narrower principle, called variously estoppel by judgment or collateral estoppel, which is here involved.

In *Commissioner v. Sunnen*, *supra*, pp. 597-598, this Court analyzed and defined the scope of *res judicata* and collateral estoppel as applied to federal tax litigation, as follows:

* * * The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac*, 94 U. S. 351, 352.

⁴ See also, Griswold, *Res Judicata in Federal Tax Cases*, 46 Yale L. J. 1320 (1937); *Res Judicata in Federal Taxation*, Paul, *Selected Studies in Federal Taxation* (2d Series, 1938) 104; Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1 (1942); *Developments in the Law—Res Judicata*, 65 Harv. L. Rev. 818, 840-850 (1952); *Restatement of the Law of Judgments*, Secs. 68, 69, 70. And see Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 Ill. L. Rev. 41 (1940).

The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See Von Moschzisker, "Res Judicata," 38 Yale L. J. 299; Restatement of the Law of Judgments, §§ 47, 48.

But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Cromwell v. County of Sac*, *supra*, 353. And see *Russell v. Place*, 94 U. S. 606; *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 48; *Mercoid Corp. v. Mid-Continent Co.*, 320 U. S. 661, 671. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a mat-

ter in litigation with the other party, he cannot later renew that duel. In this sense, *res judicata* is usually and more accurately referred to as estoppel by judgment, or collateral estoppel. See Restatement of the Law of Judgments, §§ 68, 69, 70; Scott, "Collateral Estoppel by Judgment," 56 Harv. L. Rev. 1.

These same concepts are applicable in the federal income tax field. Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving the same claim and the same tax year. But if the later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as a collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit.

In reliance upon the principle of collateral estoppel, the court below held that the Government was concluded in an action involving income and excess profit taxes for 1943, 1944 and 1945 from denying that the taxpayer's basis in certain property was \$860,000. This issue, the court held, had been conclusively determined by two

decisions of the Tax Court entered upon stipulations between the parties of "no deficiency," in earlier proceedings, involving income taxes for the years 1933, 1938 and 1939, in which the taxpayer in the petitions initiating the proceedings had alleged its basis to be that amount. In those proceedings, no evidence was received, no stipulations of facts entered, no briefs filed, no hearings held, and no arguments made upon any of the issues. In effect, the decision below extends the doctrine of collateral estoppel to embrace every issue which would have been determined by the Tax Court had these proceedings been allowed to proceed to judgment on the merits and not been disposed of upon the stipulation of the parties.

Since 1925, almost two-thirds of the litigation in the Tax Court has been settled by stipulation.⁵ Because of the fact that the dismissal of a proceeding pending in the Tax Court is, in effect, a

⁵ For stipulated decisions of the type involved here, the Tax Court employs a standard form which requires only that the case number, the names of the parties, and the stipulated deficiency, if any, be entered. See Appendix B, *infra*.

⁶ In the years from 1925 through November 30, 1952, out of 151,390 cases closed, 94,293 were settled by stipulation. For the fiscal year ending June 30, 1952, the figures were 3,326 stipulated in a total of 4,975; for the year ending June 30, 1951, 3,364 out of a total of 5,055; and for the year ending June 30, 1950, 2,732 out of 4,125.

decision against the taxpayer, a judgment entered on stipulation is the only procedure by which a pending action can be settled on the basis of either no deficiency or a deficiency different from the one originally determined. Both the Bureau of Internal Revenue and the Tax Court (see p. 21, *infra*) have consistently assumed that decisions entered on stipulation—at least where no underlying factual or legal contentions were presented to the court for resolution—affect only the particular taxable years involved, and preclude neither party from litigating, as to future tax years, issues which might have been, but were not, actually litigated in the cases settled by stipulation. Under the decision below, however, the thousands of cases so settled become conclusive adjudications of the truth of the allegations in the petitions which initiated them.

The district court found here that the value for depreciation purposes of taxpayer's property on May 1, 1913, was not in excess of \$430,000 (R. 187), and the court below has sustained that finding (R. 211).⁸ Yet because the Government

⁸ Section 1117 (d) of the Internal Revenue Code (26 U. S. C. 1946 ed., Sec. 1117), provides that "If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Tax Court dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Commissioner."

⁹ In view of the fact that the district court held, on the merits, that the Commissioner had properly determined the taxpayers' basis in its property (R. 188), and that the Court of Appeals, from its examination of the entire record, found no error in this conclusion (R. 211), it is assumed that this

agreed in 1944, when this taxpayer was engaged in a reorganization proceeding, to relinquish a claim for taxes for three years amounting to less than \$3,000, the taxpayer now has a vested right,

Court will not reexamine the concurrent findings of the two lower courts that the taxpayer's basis in its property did not exceed \$430,000. *Allen v. Trust Co.*, 326 U. S. 630, 636; *United States v. O'Donnell*, 303 U. S. 501, 508. In any event, examination of the record would confirm such findings.

The taxpayer's basis in its property is its cost, plus, for purposes of depreciation, any expenditures chargeable to capital account. Internal Revenue Code, Secs. 113, 114, 718. (Appendix A; *infra*, pp. 34-37.) The basis alleged in the complaint, \$870,383, rested on an alleged cost of acquisition of \$600,000, on capital expenditures before 1920, amounting to \$260,000, primarily for finishing the top eleven floors of the building, and on a capital expense after 1939 of \$10,383. (R. 2-5.)

No attempt was made by the taxpayer in the district court to prove the claimed investment in completing the top eleven floors of the building and, in the court below, the taxpayer acknowledged that "it was definitely shown at the trial of the cause that the top eleven floors were finished before May 1, 1913". The trial court found as a fact that the building was fully completed when the taxpayer acquired it. (R. 187.) As to the other claimed capital expenditures, it was conceded prior to trial that, with the exception of the item of \$10,383, representing a city tax and, which by stipulation is no longer in controversy (R. 40), and another small item, never in issue, all the other capital expenditures incurred by the taxpayer in connection with the property—totalling less than \$24,000 in all—had been fully depreciated prior to the taxable years here involved (R. 38).

Consequently, the taxpayer's basis depends solely upon the cost to it of the property. Since the property was acquired on May 1, 1913, for stocks and bonds, the taxpayer's cost is the value of these securities at the time. These securities consisted of bonds, secured by a first deed of trust on the property, with a face value of \$300,000 and the taxpayer's

of which it can never be deprived, in a basis of \$860,000. This means not only that the taxpayer is entitled to recover the taxes for the years in-

entire authorized capital stock, six thousand shares with a face value of \$300,000. (R. 86.) The bonds, it was conceded, had the value shown on their face, \$300,000; the only issue is as to the value of the stock. In the trial court, the Government showed by sales and by contemporaneous records reflecting the value placed on the stock that its fair market value in 1913 did not exceed \$108,000, or \$18.00 a share. Among other things it was shown that the company which acquired the stock in 1913 valued it on its books at \$100,000, or approximately \$16.67 per share, and took an immediate loss of \$24,525 on the basis of this value (R. 175, 181-182); that offering the stock at \$18.00 a share, it was able to sell fewer than five hundred shares between 1913 and 1920 (R. 167-168, 182); and that in 1920 it sold the balance to their present owner for approximately \$13.67 per share (R. 44, 167, 182). The trial court found as a fact that the taxpayer placed a maximum value on its own stock, as of May 1, 1913, of \$18.00 per share. (R. 187.)

The taxpayer, to show the value of its stock, relied exclusively on opinion evidence by two real estate experts as to the value of the property at the time it was acquired by the taxpayer. (R. 103-106, 106-107.) Equating the highest value they placed on the property in 1913, \$850,000 (R. 103), with the securities given for it, yields a value for the taxpayer's stock of approximately \$90.00 per share, or roughly five times the price at which they were sold—with difficulty—at the time. As the district court pointed out, the only explanation of this wide variance is "an error in the judgment" of the taxpayer's witnesses. (R. 183.)

It is clear from the record, therefore, that the cost of the property to the taxpayer did not exceed \$408,000, \$108,000 in stock and \$300,000 in bonds. Accordingly, the Commissioner's determination, sustained by both courts below, that the taxpayer's basis in its property did not exceed \$430,000 (a figure arrived at by him without knowledge of the sales price of the taxpayer's stock, but on the basis of other infor-

volved in this action, but also that no taxes need be paid on future income equal in amount to the fictional basis of \$860,000 created by the estoppel, minus depreciation already taken. In other words, \$430,000 in income, the difference between the actual basis and the fictional basis, minus depreciation already allowed, is made tax-free.

It is respectfully submitted that the decision below, which is so upsetting to the practical every-day administration of the tax program, rests upon a misunderstanding of the scope of the doctrine of collateral estoppel. The court below stated the controlling question before it to be whether "consent decrees will support a plea of *res judicata*." (R. 223.) Having concluded that such decrees would, it held that the decisions entered by the Tax Court in the prior proceedings made the taxpayer's basis *res judicata*. It did so on the ground that "the ultimate facts for determination" in this action were identical with those in the prior proceedings, stating that "Of course, if consent decrees are to be given effect as *res judicata* it must follow that the similarity of the ultimate fact or issue is alone necessary, since very frequently consent decrees and judgments are entered on stipulation without a recitation of the facts upon which the agreement was reached." (R. 214.)

mation (R. 43-44)) is clearly correct and, if anything, over-generous.

This is correct as to the precise cause of action adjudicated by a consent judgment, but in this case that cause of action related only to respondent's tax liability for the years for which the settlement was made. In so far as the court below concluded that consent decrees of the character here involved, based solely upon the agreement of the parties and not involving any inquiry into or determination by the court of any legal or factual issue, will sustain a plea of estoppel for subsequent tax years, it is in square conflict with the Court of Appeals for the Tenth Circuit. *Trapp v. United States*, 177 F. 2d 1, certiorari denied, 339 U. S. 913. Its treatment of these decrees as making *res judicata* issues raised by the pleadings which would have been determined by the court, had the matter proceeded to judgment on the merits, but which were not in fact so determined because of the settlement between the parties, cannot be reconciled with decisions by the Courts of Appeals for the First, Second and Fourth Circuits. *Pelham Hall Co. v. Hassett*, 147 F. 2d 63 (C. A. 1); *Hartford-Empire Co. v. Commissioner*, 137 F. 2d 540 (C. A. 2), certiorari denied, 320 U. S. 787; *Stanback v. Robertson*, 183 F. 2d 889 (C. A. 4), certiorari denied, 340 U. S. 904.⁹ The latter cases follow

⁹ In the *Hartford-Empire* case, Judge Learned Hand said: "How far a decision upon a question of law can be an estoppel in a later action upon a different cause of action is a vexed question, but no one has ever suggested that it can extend to matters not actually litigated." (137 F. 2d at 542.)

principles applied by this Court in more than a score of cases, including *Cromwell v. County of Sac*, 94 U. S. 351; *Commissioner v. Sunnen*, 333 U. S. 591, and *Tait v. Western Md. Ry. Co.*, 289 U. S. 620.

A. DECISIONS OF THE TAX COURT ENTERED UPON STIPULATIONS OF "NO DEFICIENCY" WILL NOT SUPPORT A PLEA OF ESTOPPEL

Contrary to the decision below, the Court of Appeals for the Tenth Circuit has held that a decision of the Tax Court of the character here involved, "not predicated upon stipulated facts, or upon findings of fact, or upon a determination on the merits, but merely to carry out a compromise agreement of the parties, fails to constitute an effective judicial determination of any litigated right" and "will not support a plea of estoppel." *Trapp v. United States*, *sup. j.*, p. 5. The decisions of the Tax Court have been uniformly to the same effect. *Volunteer State Life Insurance Co. v. Commissioner*, 35 B. T. A. 491, 494-495, reversed on other grounds, 110 F. 2d 879 (C. A. 6), certiorari denied, 310 U. S. 636; *Riter v. Commissioner*, 3 T. C. 301, 305; *Pitcairn v. Commissioner*, decided May 22, 1944 (1944 P-H T. C. Memorandum Decisions, par. 44,185); *Laughlin v. Commissioner*, decided October 3, 1944 (1944 P-H T. C. Memorandum Decisions, par. 44,317); cf. *Wayne Body Corp. v. Commissioner*, 22 B. T. A. 401; *Stanley Co. of America v. Commissioner*,

26 B. T. A. 705; *Keener Oil & Gas Co. v. Commissioner*, 32 B. T. A. 186.

Since the doctrine of collateral estoppel is intended to preclude relitigation of points which have already been contested and decided, the decisive question is, not, whether the decree was one entered by consent of the parties, but whether it is, on the one hand, a mere authentication, or recording, of the agreement of the parties or, on the other, a judicial determination of litigated issues. Admittedly, a judgment may rest upon a judicial determination on the merits even where the defendant has defaulted (*Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683) or has consented to judgment (Cf. *Harding v. Harding*, 198 U. S. 317; *Swift & Co. v. United States*, 276 U. S. 311; *United States v. Radio Corp. of America*, 46 F. Supp. 654 (D. Del.), appeal dismissed, 318 U. S. 790). However, it is clear that each of the decisions here involved was, in the language of the Tax Court, in a similar case, merely a *pro forma* acceptance of "an agreement of the parties to settle their * * * controversy for undisclosed reasons satisfactory to themselves." (*Riter v. Commissioner, supra*, p. 305) and rested upon no independent judicial determination by the court. This Court in a parallel, but different, context has indicated that such decrees are essentially in the nature of judicially recorded agreements of the parties. *Gay v. Parpart*, 106 U. S. 679; *Law-*

rence Mfg. Co. v. Jamesville Cotton Mills, 138 U. S. 552.

In none of the cases cited by the court below in which an estoppel was based upon a consent decree was the decree, as here, a naked decision in favor of one party, involving no inquiry into the facts, no examination of the issues and no determination either of fact or law, being based solely upon the agreement of the parties.¹⁰ Clearly, none of the considerations of policy underlying the doctrine of collateral estoppel, economy of

¹⁰ Only four of the cases cited by the court below clearly involve the doctrine of collateral estoppel. *Utah Power & Light Co. v. United States*, 42 F. 2d 304 (C. Cls.); *O' Cedar Corp. v. F. W. Woolworth Co.*, 66 F. 2d 363 (C. A. 7); *Warner v. Tennessee Products Corp.*, 57 F. 2d 642 (C. A. 6), certiorari denied, 281 U. S. 632; *Roberts Cone Mfg. Co. v. Bruckman*, 266 Fed. 986 (C. A. 8), certiorari denied, 254 U. S. 649. In each of these cases the issue sought to be concluded in the second suit had been specifically adjudicated by the judgment in the first suit and language to that effect had been included in the decree. Moreover, it was so clear that the first suit had been intended to put beyond question the very issue sought to be relitigated in the second, that not to apply an estoppel would clearly have been to permit repetitious law suits. In the other cases cited by the court below there was either no question of collateral estoppel (*Swift & Co. v. United States*, 276 U. S. 311; *United States v. Radio Corp. of America*, 46 F. Supp. 654 (D. Del.), appeal dismissed, 318 U. S. 796; *Woods Bros. Const. Co. v. Yankton County, S. D.*, 54 F. 2d 304 (C. A. 8)) or the second action was so closely related to the first as to make *res judicata* in its strict sense, rather than collateral estoppel, applicable. In two of the cases cited by the court below the second action was on the same cause of action as the first (*Continental Petro-*

judicial time and prevention of repetitious litigation, *Commissioner v. Sunnen*, 333 U. S. 591, 599, has any application to such a decree. Consequently, the plea of estoppel should not bar a court, where there has been no previous judicial determination of the merits, from making such a determination. That the parties were willing in connection with one cause of action to forego such a determination should not bind them in subsequent causes. Otherwise, the doctrine of collateral estoppel becomes a device by which a decision not on the merits can forever foreclose inquiry into such merits. For these reasons the court below should have rejected, as did the Court of Appeals for the Tenth Circuit, the plea of estoppel, based on a decision of the Tax Court, not on the merits, but entered solely to dispose of the case in accordance with the agreement of the parties. Cf. *Freuhauf Trailer Co. v. Gilmore*, 167 F. 2d 334 (C. A. 10); *Cutter v. Arling-*

leum Co. v. United States, 87 F. 2d 91 (C. A. 10), certiorari denied, 300 U. S. 679; *Snell v. J. C. Turner Lumber Co.*, 285 Fed. 356 (C. A. 2), certiorari denied, 261 U. S. 616; in which case there is, of course, no question that *res judicata* is an absolute bar (*United States v. Parker*, 120 U. S. 89; *Nashville, &c., Railway Co. v. United States*, 113 U. S. 261). In a third the second suit was so clearly embraced within the first action as to make *res judicata* applicable (*Rector v. Suncrust Lumber Co.*, 52 F. 2d 946 (C. A. 4)); and in another the second suit was in execution of the first, in which case, also, the former decree is admittedly conclusive (*Ingraham Co. v. Germanow*, 4 F. 2d 1002 (C. A. 2)).

ton Casket Co., 255 Mass. 52; *Jenkins v. Robertson*, 1 Sc. & Div. App. 117; Restatement of the Law of Judgments, Sec. 68.¹¹

B. THE CENTRAL ISSUE IN THIS ACTION, THE TAXPAYER'S BASIS IN ITS PROPERTY, WAS NOT LITIGATED OR DETERMINED IN THE PRIOR PROCEEDINGS

Even if it be assumed that decrees of the Tax Court of the character here involved can in some possible circumstances form the basis for a plea

¹¹ Section 68 of the Restatement of the Law of Judgments states: "A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action."

Comment *i* to that section deals with its application to judgments by confession:

Where no issues are litigated between the parties, but the defendant confesses judgment, the judgment is not binding on the parties in subsequent actions based on a different cause of action. * * *

Comment *f* states:

If in the original action the defendant fails to deny a material allegation contained in the plaintiff's complaint, he thereby admits the truth of the allegation for the purposes of that action, and if judgment is given for the plaintiff the defendant cannot attack it by showing that the plaintiff's allegation was not true. But in a subsequent action based on a different cause of action he is not precluded from denying the truth of the allegations of the plaintiff's complaint in the original cause of action.

Comment *d* reads:

A judgment on one cause of action is not conclusive in a subsequent action based upon a different cause of action as to questions of fact which might have been but were not litigated and determined in the prior action. The

of estoppel, there could be no estoppel here as to the taxpayer's basis in its property since the record does not establish that this issue was either litigated or determined in the proceedings involving the prior tax years.

It is fundamental that "where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action * * *. Only upon such matters is the judgment conclusive in another action." *Cromwell v. County of Sac*, 94 U. S. 351, 353; *Tait v. Western Md. Ry. Co.*, 289 U. S. 620, 625-626; *Mercoid Corp. v. Mid-Continent Coal*, 320 U. S. 661, 671; *Davis v. Brown*, 94 U. S. 423; *Nesbit v. Riverside Independent District*, 144 U. S. 610; *Southern Pacific Railroad v. United States*, 168 U. S. 1; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 401. And to sustain the plea it must be shown either by the record or by extrinsic evidence that the

failure of the defendant to interpose a defense in the prior action which resulted in a judgment against him precludes him, it is true, from relying upon that defense thereafter in so far as the same cause of action is concerned. As to that cause of action the judgment is conclusive as to all defenses which the defendant interposed or might have interposed (*see* § 47). The result is different, however, as to the effect of the judgment upon other causes of action: The defendant is not precluded from interposing a defense to the subsequent action

particular controversy sought to be concluded was involved and determined in the former suit. *Russel v. Place*, 94 U. S. 606, 698; *Packet Co. v. Sickles*, 5 Wall. 580; *Oklahoma v. Texas*, 256 U. S. 70, 88; *Emich Motors Corp. v. General Motors Corp.*, 340 U. S. 558, 569; *Sealfon v. United States*, 332 U. S. 575, 578.

This principle has been repeatedly applied in tax cases. Thus, the Court of Appeals for the First Circuit refused to find that a decision of the Board of Tax Appeals made the basis for depreciation of property held by the taxpayer *res judicata* in litigation involving subsequent tax years because the issue relied on by the taxpayer in the later proceeding had not been contested or

which he might have interposed but did not interpose in the first action.

Although it is not unfair to the losing party to hold that any question of fact actually determined in the action shall be conclusive against him in a subsequent action between the parties based upon a different cause of action, it would be unfair to him to hold that he is precluded from relying upon facts which might have been but were not determined in the prior action. If the defendant fails to interpose a defense in the prior action and judgment is given against him, the original cause of action is merged in the judgment; but there is no reason why he should not make the defense when sued upon a different cause of action. He may have various reasons for not interposing the defense in the first action and for permitting the plaintiff to obtain a judgment against him in that action. It may be that the action involves so small an amount that a defense to the action would cost him more than he would lose by failing to defend.

decided in the earlier action. In the earlier proceeding, both sides had assumed that the proper basis for depreciation was the cost of the building to the taxpayer; in the later proceeding, the taxpayer urged that the proper basis was the cost to its predecessor because the taxpayer had acquired the building in a tax-free organization. *Pelham Hall Co. v. Hassett*, 147 F. 2d 63.

The Court of Appeals for the Second Circuit, after observing that an estoppel by judgment "depends upon whether the actual point was decided and was necessary to the decision", held that the Commissioner was not estopped from questioning the basis for depreciation of certain patents owned by the taxpayer by a decision of the Tax Court assessing deficiencies for earlier years. It reached this conclusion because the Commissioner had conceded in the earlier actions that the basis for depreciation was the cost of the patents to the taxpayer and he was contending in the second suit that the correct basis was their cost to the taxpayer's assignors, a question not previously litigated. *Hartford-Empire Co. v. Commissioner*, 137 F. 2d 540, 541, certiorari denied, 320 U. S. 787.

In similar circumstances, the Court of Appeals for the Fourth Circuit held that the doctrine of collateral estoppel could not be invoked to prevent inquiry into the validity of a partnership for income tax purposes since in the prior pro-

ceeding in the Tax Court, upon which it was sought to base the estoppel, involving the same parties and the same facts, that issue had not been litigated. *Stanback v. Robertson*, 183 F. 2d 889, certiorari denied, 340 U. S. 904.¹²

See also *Argo v. Commissioner*, 150 F. 2d 67 (C. A. 5), certiorari denied, 326 U. S. 762; *Travelers Ins. Co. v. Commissioner*, 161 F. 2d 93 (C. A. 2), certiorari denied, 332 U. S. 766; *Commissioner v. Texas-Empire Pipe Line Co.*, 176 F. 2d 523 (C. A. 10); *Blaffer v. Commissioner*, 134 F. 2d 389 (C. A. 5); *Burford-Toothaker Tractor Co. v. Commissioner*, 192 F. 2d 633 (C. A. 5), certiorari denied, 343 U. S. 941; *Cory v. Commissioner*, 159 F. 2d 391 (C. A. 3); *Gillespie v. Commissioner*, 151 F. 2d 903 (C. A. 10), certiorari denied, 328 U. S. 839.

In the present case it is clear that the only issues determined by the Tax Court in the prior actions were that there were no deficiencies in

¹² It may be suggested that *Pelham Hall Co. v. Hassett*, *supra*, *Hartford-Empire Co. v. Commissioner*, *supra*, and *Stanback v. Robertson*, *supra*, are distinguishable because the issue not previously litigated in each was one of law. The essential fact, however, is that the court permitted in each case relitigation of the ultimate fact determined in the prior proceeding, which in two of the three cases was the same issue as is here involved, the taxpayer's basis for depreciation, because one of the premises upon which it rested had not been litigated. In this case, neither the ultimate fact, the basis for depreciation of the taxpayer's property, nor any of the underlying facts were either litigated or determined. *A fortiori*, there can be no estoppel here.

the taxpayer's income taxes for 1933, 1938 and 1939, and that the assessments previously made against it for those years were abated. Every other issue was removed from the case by the agreement of the parties. There can be no estoppel as to the taxpayer's basis for depreciation since this issue was not presented to, or considered and resolved by, the Tax Court.

Implicit in the opinion of the court below is the assumption that the taxpayer's petitions in the prior proceedings defined the questions raised and determined there. That might be true if the judgments had been rendered on the pleadings because of the default of the defendant. But cf. footnote 11, *supra*. However, the judgments rested not on the pleadings but on the agreement of the parties. The decisions entered by the Tax Court recited simply (R. 52, 54) that they were entered "[u]nder written stipulation signed by counsel for the parties" in the proceedings; no reference was made to the pleadings, and there is no indication that Judge Murdock, who signed the orders, even had the pleadings before him at the time. The specific issues raised by the pleadings were not submitted to the Tax Court for determination, and they were not determined, either in fact or in law, by the court's formal orders. Nor is there any evidence that there was an agreement upon these issues by the parties. The opinion of the court below rests upon the mistaken assumption that there was such an agree-

ment. The court below assumed that the "ultimate fact" for determination in the prior proceedings was the taxpayer's basis in its property; that the parties agreed upon this basis because they agreed to a decision of no deficiency; and that they are therefore concluded by the judgment entered upon their agreement. But there is nothing whatsoever in the record to support the conclusion of the court below that the parties had "threshed out the facts" and "agreed upon the basis for depreciation." (R. 223.)

In so far as extrinsic evidence throws any light upon the Commissioner's reasons for entering in the stipulations, it negatives the idea that he accepted the taxpayer's contention as to the merits of any of the issues in dispute. The record shows that four days before the stipulations for the Tax Court's decision was executed, the Collector and the taxpayer had withdrawn by stipulation the Government's claim in the bankruptcy court for the taxes in question. This stipulation recites that it is (R. 51)—

without prejudice and does not constitute a determination of the merits and does not prejudice the rights or remedies of the United States for the collection of Internal Revenue taxes that may be due with respect to any year other than those involved * * *

The fact that these restrictions were not incorporated in the briefer stipulations filed in the Tax Court was undoubtedly due to the fact that

the latter were in a form which the Bureau of Internal Revenue had always assumed, and the Tax Court had held, carried these restrictions with it, by operation of law.

All that the record shows is that the Commissioner, for reasons which are not disclosed, elected not to contest the two earlier proceedings. Obviously, many considerations other than the merits may have entered into this decision. The amount of money involved was small and the taxpayer was in reorganization. The Commissioner must utilize limited personnel and funds in the most productive way. Not every case can be litigated; some selection must be made. As this Court pointed out in *Cromwell v. County of Sac*, 94 U. S. 351, 356, many considerations "may govern a party in bringing forward grounds of recovery or defence in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time." These considerations and others¹³ affect the Government as a litigant, as well as private parties. In view of the variety of reasons which may have

¹³ Among the reasons, apart from the merits of the particular case, which commonly lead to stipulated decisions, the following may be noted: (1) Discovery of adjustments on issues other than those originally in dispute between the taxpayer and the Commissioner which result in elimination of the asserted deficiency; (2) discovery of procedural defects or irregularities in the Commissioner's deficiency determination for the particular year or years involved.

led the Commissioner not to continue the controversy, there is no basis for concluding that his decision was based on acquiescence in the merits of the taxpayer's claim.

In any event, it is clear that, whatever reasons led the Commissioner to agree to the decisions entered by the Tax Court, the only issues which those decisions determined, in view of the record upon which they rest, was that nothing was owing from the taxpayer for the years 1937, 1938 and 1939. Consequently, those decisions should not now preclude the Commissioner from litigating the issue as to the basis to the taxpayer of its leasehold, since this question was not, even though it might have been, "actually presented and determined in the first suit." *Commissioner v. Sunnen*, 333 U. S. 591, 598.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals is erroneous and should be reversed.

Respectfully submitted.

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Acting Solicitor General.

H. BRIAN HOLLAND,
Assistant Attorney General.

PHILIP ELMAN,
ELLIS N. SLACK,
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Special Assistants to the Attorney General.

MARCH 1953.

APPENDIX A

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(1) [As amended by Sec. 121 (c), Revenue Act of 1942, c. 619, 56 Stat. 798.]

Depreciation.—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

(n) *Basis for Depreciation and Depletion.*—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

(s) [As added by Sec. 211 (a), Revenue Act of 1939, c. 247, 53 Stat. 862] *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

(26 U. S. C. 1946 ed., Sec. 23.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property except that—

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the

sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as herein-after provided.

(1) [As amended by Sec. 130 (b), Revenue Act of 1942, *supra*.] *General rule.*— Proper adjustment in respect of the property shall in all cases be made—

(A) For expenditures, receipts, losses, or other items, properly chargeable to capital account, but no such adjustment shall be made for taxes or other carrying charges * * * for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years;

(B) In respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed (but not less than the amount allowable) under this chapter or prior income tax laws. * * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 113.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION:

(a) *Basis for Depreciation.*—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property.

* * * * *

(26 U. S. C. 1946 ed., Sec. 114.)

SEC. 122. [As added by Sec. 211 (b), Revenue Act of 1939, *supra*.] NET OPERATING LOSS DEDUCTION.

(a) [As amended by Sec. 105 (e) (3) (A), Revenue Act of 1942 *supra*.] *Defini-*

tion of Net Operating Loss.—As used in this section, the term “net operating loss” means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) [As amended by Sec. 153 (a), Revenue Act of 1942, *supra*.] *Amount of Carry-Back and Carry-Over.*—

* * * * *

(2) *Net operating loss carry-over.*—If for any taxable year the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the two succeeding taxable years, * * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 122.)

SEC. 718. [As added by Sec. 201, Second Revenue Act of 1940, c. 757, 54 Stat. 974, and amended by Sec. 218, Revenue Act of 1942, *supra*.] EQUITY INVESTED CAPITAL.

(a) *Definition.*—The equity invested capital for any day of any taxable year shall be determined as of the beginning of such day and shall be the sum of the following amounts, reduced as provided in subsection (b).—

(1) *Money paid in.*—Money previously paid in for stock, or as paid-in surplus, or as a contribution to capital;

(2) *Property paid in.*—Property (other than money) previously paid in regardless of the time paid in) for stock, or as paid-in surplus, or as a contribution to capital. Such property shall be included in an amount equal to its basis (unadjusted) for determining loss upon sale or exchange. If the property was disposed of before such taxable year, such basis shall be de-

terminated under the law applicable to the year of disposition, but without regard to the value of the property as of March 1, 1913. If the property was disposed of before March 1, 1913, its basis shall be considered to be its fair market value at the time paid in. If the unadjusted basis of the property is a substituted basis, such basis shall be adjusted, with respect to the period before the property was paid in, by an amount equal to the adjustments proper under section 115 (1) for determining earnings and profits;

* * * * *

(26 U. S. C. 1946 ed., Sec. 718.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.23 (1)-1. *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business, or treated under section 29.23 (a)-15 as held by the taxpayer for the production of income, may be deducted from gross income. For convenience such an allowance will usually be referred to as depreciation, excluding from the term any idea of a mere reduction in market value not resulting from exhaustion, wear and tear, or obsolescence. The proper allowance for such depreciation is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the useful life of the depreciable property, equal the cost or other basis of the property determined in accordance with section 113. * * *

Treasury Regulations 112, promulgated under the Internal Revenue Code:

SEC. 35.718-1. DETERMINATION OF DAILY EQUITY INVESTED CAPITAL.—MONEY AND PROPERTY PAID IN.—The equity invested capital for any day is determined as of the beginning of such day. The basis or starting point is found in the amount of money and property previously paid in for stock, or as paid-in surplus, or as a contribution to capital. The terms "money paid in" and "property paid in" do not include amounts received as premiums by an insurance company subject to taxation under section 204. For the purpose of determining equity invested capital, the amount of any property paid in is the unadjusted basis to the taxpayer for determining loss upon a sale or exchange under the law applicable to the taxable year for which the invested capital is being computed.

* * * * *

If the basis to the taxpayer is cost and stock was issued for the property, the cost is the fair market value of such stock at the time of its issuance. If the stock had no established market value at the time of the exchange, the fair market value of the assets of the company at that time should be determined and the liabilities deducted. The resulting net worth will be deemed to represent the total value of the outstanding stock. In determining net worth for the purpose of fixing the fair market value of the stock at the time of the exchange, the property paid in for such stock shall be included in the assets at its fair market value at that time.



THE TAX COURT OF THE UNITED STATES
WASHINGTON

Petitioner,

v.

Docket No.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Under written stipulation signed by counsel for the parties
in the above-entitled proceeding and filed with the Court on

it is

ORDERED and DECIDED:

Enter:

Judge.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
APR 1953
HAROLD W. WILLEY, Clerk

No. 508

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, PETITIONER

INTERNATIONAL BUILDING COMPANY, A CORPORATION

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 508

UNITED STATES OF AMERICA, PETITIONER

v.

INTERNATIONAL BUILDING COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR THE UNITED STATES

Respondent's brief contains arguments and authorities which relate, for the most part, to issues as to which there is no dispute in this case. For that reason it may be helpful to restate what the Government's position is, and what it is not:

1. Concededly, a decision of the Tax Court entered upon a stipulation of the parties that there is no deficiency, or that there is a deficiency or overpayment of x dollars, is conclusive in all respects as to the liability for the tax year to which it relates. Such a decision is *res judicata*, in the fullest sense, in any subsequent proceeding involving the same taxpayer, the same claim, and the

same tax year.¹ Neither the taxpayer nor the Commissioner can thereafter, on any ground other than those traditionally available to overcome *res judicata* (e.g., fraud, duress, lack of jurisdiction), seek to reduce or increase the taxpayer's liability for the claim and year concerned. *Continental Petroleum Co. v. United States*, 87 F. 2d 91 (C.A. 10); *Backus v. United States*, 59 F. 2d 242 (C. Cls.); *American Woolen Co. v. United States*, 18 F. Supp. 783, 788-789 (C. Cls.); *Lehigh Valley Trust Co. v. United States*, 34 F. Supp. 839 (E.D. Pa.); *Almours Securities, Inc.*, 35 B.T.A. 61, 68-69; cf. Sec. 322(c), Internal Revenue Code (26 U.S.C. 1946 ed. 322(c)).

2. As to tax liability for succeeding years, the effect of a Tax Court decision depends on the application of the doctrine of collateral estoppel. "Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving the same claim and the same tax year. But if the later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as a collateral estoppel only as to those matters in the second proceeding which were actually pre-

¹ Where the later proceeding involves the same year but a different claim, not presented to or decided by the Tax Court, its decision is, of course, not *res judicata* in any sense. *United States v. Erie Forge Co.*, 191 F. 2d 627 (C.A. 3).

presented and determined in the first suit." *Commissioner v. Sunnen*, 333 U. S. 591, 598; *Tait v. Western Md. Ry. Co.*, 289 U. S. 620, 623-625.

3. Concededly, where the Tax Court has decided controverted issues of fact, or where the parties have stipulated facts which the Tax Court has accepted, such facts are conclusive in proceedings between the parties for later years, subject to the qualification that "the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment." *Commissioner v. Sunnen*, *supra*, pp. 601-602; *Tait v. Western Md. Ry. Co.*, *supra*, pp. 625-626; *Commissioner v. Texas-Empire Pipe Line Co.*, 176 F. 2d 523 (C.A. 10); *Arthur C. James*, 31 B.T.A. 712, 719; cf. *Pelham Hall Co. v. Hassett*, 147 F. 2d 63 (C.A. 1); *Blaffer v. Commissioner*, 134 F. 2d 389, 390 (C.A. 5); *Stanback v. Robertson*, 183 F. 2d 889, 894 (C.A. 4); *Sam Schnitzer*, 13 T.C. 43, 55-56, affirmed 183 F. 2d 70 (C.A. 9).²

² Thus, in the *Pelham Hall* case, *supra*, the Board of Tax Appeals, in a sharply contested proceeding relating to the year 1931, had affirmed the Commissioner's determination that taxpayer's depreciation base on a certain building was \$362,700. In a later proceeding involving the year 1936, the taxpayer contended that the transaction in which it had acquired the building was a tax-free reorganization and that it therefore was entitled to take over the base used by its predecessor, i.e., \$806,000. Although the Commissioner argued that the \$362,700 base was made *res judicata* by the decision for the year 1931, the Court of Appeals rejected his plea. It pointed out that in the earlier proceedings no claim was made that the acquisition was part of a tax-free reorganization, and that even though the Board had expressly stated in its opinion that "The new corporation started upon a new basis and its depreciation is meas-

4. Where, however, as in this case, the parties file a stipulation in the Tax Court which recites that the parties have agreed that there is no deficiency due from the taxpayer for the year in controversy, or that there is a deficiency or overpayment of x dollars, and no other facts are stipulated, the Tax Court treats such a stipulation as an effective disposition of the case, and enters a formal order carrying out the agreement of the parties without any examination into the merits of any issues of fact or law which might be involved. No hearing is held, no evidence received, no briefs filed, and no arguments made in connection with the entry of orders based on such stipulations.

In the Appendix to this brief (p. 10, *infra*) is printed a letter of Victor S. Mersch, Esq., Clerk

urable accordingly", this statement meant only that the Board was accepting the issue as tendered in the petition and was making the same assumption which had been made by the Commissioner and the taxpayer, that the refinancing transaction was not a tax-free reorganization." (147 F. 2d at 66.)

The court noted that when the taxpayer filed its petition for review with the Board for the year 1931, the "indications then were that the transaction would not be held to be a tax-free reorganization," but that since that time it had become clear from intervening decisions of this Court that the transaction would be so regarded. It concluded that the taxpayer should not, for years after 1931, be forever barred from using the depreciation base of its transferor, which it would otherwise be entitled to do, because of a collateral estoppel created by the 1931 decision. The court held that in the 1931 proceedings "the Board had before it no controverted issue as to whether the transaction was a tax-free reorganization; that no such question was 'actually litigated and determined' by the Board within the meaning of the rule as laid down in the *Cromwell* case." Judge Magruder's opinion for the court stated (147 F. 2d at 67):

It would be possible to play with words by asserting that the issue presented to the Board was whether the Com-

of the Tax Court, dated March 25, 1953, in which he describes the practice of that court with respect to decisions based upon such stipulations.³ Mr. Mersch states:

After a stipulation of deficiency has been received and docketed, the Clerk of the Court or one of his Deputies examines the pleadings of the case and verifies that the stipulation will determine the tax liabilities involved in the litigation and effect a complete disposition of the case. Thereupon he prepares from the stipulation an appropriate form of decision to be entered by the Court.

It is not the practice of the Court itself otherwise, to check the pleadings before the decision is signed and entered. In fact, in many of these cases, the decision is entered in

missioner was in error in reducing the taxpayer's basis for depreciation to \$362,700; that the Board's decision upheld the Commissioner's determination; and that the taxpayer cannot escape the binding effect of this decision in litigation involving the same issue for a succeeding tax year by producing a new argument or new evidence in support of the proposition previously decided against it. See *Tait v. Western Maryland R. Co.*, 1933, 4 Cir., 62 F. 2d 933, 935. The matter should be put this way only if the policy behind the doctrine of collateral estoppel by judgment is deemed to be so strong that the courts should be astute to give the doctrine the widest possible application. We believe, on the contrary, that particularly as regards questions of law in tax cases, collateral estoppel by judgment should be rather narrowly applied. To minimize the recurring hardship to the taxpayer or prejudice to the revenue (as the case may be), with respect to the taxes for all succeeding tax years, neither the taxpayer nor the government should be precluded from raising a relevant point of law unless it appears beyond doubt that the precise point was actually contested and decided (not merely assumed) in the prior litigation.

³ This letter has been filed with the Clerk of this Court.

the name of the Chief Judge by action of the Clerk or the Chief Deputy Clerk.

Apart from the decision below in this case, it has been consistently recognized that such a decision of the Tax Court, although conclusive as to the tax claim and year to which it relates, can not form the basis of a collateral estoppel for future years as to any issue involved, because no determination on the merits is made. (See cases cited in our main brief, pp 21-22.) A decision based on a stipulation of a specified deficiency or overpayment, and "not predicated upon stipulated facts, or upon findings of fact, or upon a determination on the merits, but merely to carry out a compromise agreement of the parties, fails to constitute an effective judicial determination of any litigated right" and "will not support a plea of estoppel." *Trapp v. United States*, 177 F. 2d 1, 5 (C.A. 10). "Where the entire controversy is disposed of by the Board on stipulation and without any consideration, there has been no adjudication." Griswold, *Res Judicata in Federal Tax Cases*, 46 Yale L. J. 1320, 1338.

The Tax Court, which is the best judge of the nature and effect of its own determinations, has expressly marked the difference between decisions based upon a stipulation of facts and those based upon a stipulation of deficiency or overpayment without reference to any underlying issues of fact or law. In the leading case of *Margaret A. C. Riter*, 3 T. C. 301, reviewed by the entire court and decided February 18, 1944, Judge Murdock (who

signed the orders in the present case on October 17, 1944—R. 52, 54) wrote (3 T.C. 305):

We have heretofore held that a judgment based upon a stipulation such as was filed in complete settlement of the 1936 case (as opposed to a stipulation of facts upon which a tribunal has based its independent judgment, see *Arthur Curtiss James*, 31 B. T. A. 712) is not a decision on the merits which will support a plea of the kind here made, raised as it is in a proceeding involving a different cause of action. See *Almours Securities, Inc.*, 35 B. T. A. 61, 69; *Volunteer State Life Ins. Co.*, 35 B. T. A. 491, 494; * * *.

In *Almours Securities, Inc.*, 35 B. T. A. 61, 69, affirmed, 91 F. 2d 427 (C.A. 5), certiorari denied, 302 U. S. 765, a no-deficiency stipulation and order thereon for the years 1927, 1928, and 1929 had been entered, and the taxpayer contended that the order created an estoppel on the merits for the years 1931 and 1932. The Commissioner admitted that the prior decision was conclusive, but only as to the years to which it related. The Board held that no estoppel was created as to the later years, since "neither the law nor the facts of the case were judicially ascertained. When the petitioner [taxpayer] and the respondent submitted the stipulation [in the prior proceedings], the Board was not advised as to the reason for the stipulation. For aught the Board knew there had been an error on the part of the respondent [Commissioner] in the determination of the deficiencies * * *."

Similarly, in *Volunteer State Life Insurance Co.*, 35 B. T. A. 491, 494-495, a Board order entered pursuant to a stipulation of the parties that there was an overpayment of tax for the year 1928 in a specified amount was held to be "a disposition of the suit by the parties and not by the Board * * *. It was not a judicial rendition on the merits and can not be the basis of a claim of *res judicata* in the present proceeding [involving the years 1929 and 1930]."

Respondent argues (Br. 13-14) that a distinction should be drawn between "compromise stipulations" and "confession stipulations". The former, respondent concedes, create no estoppel because "In the compromise settlement cases, nothing is decided or determined because the compromise is based upon neither a fact alleged in a taxpayer's petition, or the Commissioner's answer. A compromise is a settlement by mutual concessions. In the instant case there were no mutual concessions. There was a cold bald admission and confession which settled the entire controversy on the sole issue in the case."

This argument is not supported by the cases, which neither mention nor substantiate any such distinction. The Tax Court has applied the rule of the *Riter* case to all orders based on stipulations disposing of an entire controversy, without stopping to inquire whether the concessions were mutual or entirely unilateral. (See cases cited in our main brief, p. 21.) In any event, respondent's argument overlooks the central fact upon which the *Riter*

rule rests, namely, that orders entered on such stipulations are in no sense determinations on the merits of any issue involved. They serve merely to dispose of the case in accordance with the agreement of the parties, entered into for undisclosed reasons which may have nothing whatsoever to do with the merits. Both the Commissioner and taxpayer may prefer that the controversy be postponed to another day or to another forum. The amount involved for the particular year may be too small; the burden and expense of investigation and trial may, at the time, be too great; these and other reasons may commend themselves to both the Commissioner and the taxpayer as justifying settlement for the particular year without thereby waiving any rights for future years. And the procedure followed by the Tax Court, in entering orders based on such settlements, is consistent with its recognition that these orders are not decisions on the merits and create no estoppel for future years.

Respectfully submitted.

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APRIL 1953.

APPENDIX

THE TAX COURT OF THE UNITED STATES
Washington 25, D. C.

March 25, 1953

Honorable Robert L. Stern
Acting Solicitor General
Department of Justice
Washington, D. C.

Dear Mr. Stern:

In response to request from your office, you are advised that the practice of this Court with respect to decisions based upon stipulations of the parties or their attorneys as to the amount of deficiency or overpayment in any given case is as follows.

After a stipulation of deficiency has been received and docketed, the Clerk of the Court or one of his Deputies examines the pleadings of the case and verifies that the stipulation will determine the tax liabilities involved in the litigation and effect a complete disposition of the case. Thereupon he prepares from the stipulation an appropriate form of decision to be entered by the Court.

It is not the practice of the Court itself otherwise to check the pleadings before the decision is signed and entered. In fact, in many of these cases, the decision is entered in the name of the Chief Judge by action of the Clerk or the Chief Deputy Clerk.

Trusting this is the information desired, I am,

Very respectfully,

(S.) VICTOR S. MERSCH,

Clerk.

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No. 508.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

UNITED STATES OF AMERICA,
Petitioner,

v.

INTERNATIONAL BUILDING COMPANY, a Corporation.

**RESPONDENT'S BRIEF AGAINST ISSUANCE OF
WRIT OF CERTIORARI.**

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**RESPONDENT'S BRIEF AGAINST ISSUANCE OF
WRIT OF CERTIORARI.**

Respondent, taxpayer, prays that the issuance of a writ of certiorari be denied.

OPINIONS BELOW.

The opinion of the District Court (R. 178) is reported at 97 F. Supp. 595. The opinion of the Court of Appeals for the 8th Circuit appears at page (R. 206) and is reported at 199 Fed. 2 12.

JURISDICTION.

The jurisdiction of this court is admitted.

QUESTION PRESENTED BY PETITION FOR CERTIORARI.

The Commissioner of Internal Revenue assessed deficiencies against taxpayer for the taxable years 1933, 1938 and 1939 by determining that the taxpayer's basis for depreciation on its building was not \$860,000.00 as set out in its tax returns but was \$385,000.00. The respondent taxpayer filed two petitions for redetermination by the Tax Court of these deficiencies alleging as the only issue in the case that its basis for depreciation was \$860,000.00 and that it owed no tax by reason thereof. Thereafter stipulations were filed in the Tax Court executed by taxpayer and Commissioner that there were no deficiencies for the years in question. No trial was had. Pursuant to the stipulation the Tax Court entered two decisions that there were no deficiencies in income tax for the calendar years in question. Thereafter for the years 1943, 1944, and 1945, the Commissioner again assessed deficiencies determining that the taxpayer's basis for depreciation was \$430,000.00 instead of the \$860,000.00 upon which the taxpayer was still taking depreciation. The deficiencies were paid and suit for refund followed. The taxpayer making the same identical allegations as to basis for depreciation as in the prior suits before the Tax Court. The District Court held against respondent. On appeal the Court of Appeals sustained respondent taxpayer's contention that the decision of the Tax Court was res adjudicata, that the government was estopped from asserting a different basis.

The question presented on petitioner's application for certiorari is: (1) whether or not the decision is in conflict with the decision of the Court of Appeals for the 10th Circuit and (2) whether or not the following issue is suffi-

ciently important for this Court to again pass upon; as to whether a consent judgment entered by the Tax Court pursuant to stipulation without a hearing in a cause where there is only one single issue for determination, is res adjudicata on the same identical issue by the same parties, in a subsequent proceeding.

STATEMENT.

The statement in petitioner's petition for writ of certiorari states fairly well the salient facts involved; except that we disagree with petitioner's statement that the Court of Appeals recognized its holding to be in conflict with **Trapp v. United States**, 177 F. 2d 1. (10th Circuit), certiorari denied, 339 U. S. 913, in that the Court analyzed the distinction between the Trapp case and the instant case. The stipulation in Trapp case was a compromise agreement of the parties, where in the instant case, there was no compromise agreement.

In the Record, page 31, "Stipulation and agreement as to certain facts" between taxpayer and Commissioner, on page 45 of the Record it was stipulated that the allegations of the petitioner in its petitions to the Tax Court for the years 1933, 1938 and 1939 as to the \$860,000.00 basis for depreciation, is the same identical issue for determination in the instant case. Respondent taxpayer contends that the opinion of the Court of Appeals below is not in conflict with **Trapp v. United States**, supra, and that this Court has previously passed upon and held that consent judgments are res adjudicata when the same identical issue is before the Court in a subsequent proceeding between the same parties. Respondent taxpayer further contends that the decision of the Court of Appeals is in complete harmony with and follows **Commissioner of Internal Revenue v. Sunnen**, 333 U. S. 591, and the still more recent decision of **United States v. Munsingwear**, 340 U. S. 36.

REASONS FOR DENYING THE ISSUANCE OF WRIT.

There was only one single issue presented to the Tax Court in taxpayer's two petitions for redetermination for the years 1933, 1938, and 1939. That sole single issue was the basis for depreciation. By stipulations the Commissioner and taxpayer stipulated that there were no taxes due for the years in question and the Tax Court entered its judgment on the lone single issue before it that there were no deficiencies for the years involved. In *Trapp v. United States*, 177 Fed. 2d 1 (10th), certiorari denied 339 U. S. 913, page 5 of the Reporter, it appears that, after an appeal to the Board of Tax Appeals, it was stipulated as to the amount of tax deficiency and the Board of Tax Appeals entered a decision for the agreed amount, and the Court in that case said that it was merely to carry out a compromise agreement, and, therefore, the previous judgment was not *res adjudicata* and did not support a plea of estoppel in a suit for refund. Naturally there could be no estoppel in a case such as the *Trapp* case because there was a compromise agreement as to the amount of taxes and did not decide any issue in the case. It was not a consent judgment by confession of stipulation on the only issue in the case such as in the instant case.

In the same 10th circuit, that Court in a subsequent decision again recognized what was and what was not *res adjudicata*, in the case of *Martin v. Brodrick*, 177 Fed. 2 886, 887, 888, citing the *Trapp* case and the *Sunnen* case (p. 887), and by further holding (p. 888) that a mistaken notion of the law did not obviate the conclusive effect of the first judgment since the second claim was nevertheless capable of being completely determined in the first suit, citing *Guettel v. United States* (8th circuit), 95 Fed. 2 229, certiorari denied 305 U. S. 603, and then held that the question presented was a new one not present in the first case.

This ruling, subsequent to its decision in the Trapp case, clearly shows that there is no conflict between Trapp case and the instant case, and that it follows the rule laid down in the Sunnen case.

Nor is the decision of the Court of Appeals below in conflict with **Hartford-Empire Co. v. Commissioner**, 137 F. 2d 540 (2nd Circuit). In that case a stipulation was filed agreeing to a certain amount of deficiency (page 541 of reporter) and the Tax Court entered a judgment accordingly pursuant to stipulation. The Court of Appeals said at top of page 542 that the cost which is the basis for depreciation was not an issue in the earlier proceeding. That is not the situation in the instant case where there was a stipulation by confession that there were no taxes due on the only issue in the case, and judgment was entered thereon by confession of judgment. These two cases were carefully analyzed in the opinion of the Court below. In the Trapp case, on page 218 of the Record, and the Hartford-Empire case, on page 220 of the Record, the Court very carefully showed the distinction between the facts in those cases and the one in the instant case by quoting that the Trapp case was a compromise agreement as to taxes and in the Hartford-Empire case by showing that the issue presented in the second case was not determined in the former case.

There is a wide distinction between compromise stipulations and judgments entered thereon and consent judgments entered in a case where there is only one single issue for determination. In the compromise cases nothing is determined. A compromise is a settlement by mutual concessions. In a judgment by confession by consent, as in the instant case, there were no mutual concessions, the only concession being made by the Commissioner that there were no taxes due; and hence reason and logic dictate that the only issue in the case was determined by the

judgment. In the stipulation in the instant case, the Commissioner admitted that the \$860,000.00 basis for depreciation was correct because if it had been any less there would have been some taxes due.

The opinion in the Court below is in entire accord and harmony with the principles stated by this Court in **Commissioner v. Sunnen**, 333 U. S. 591, 597, 598, in the following language:

"Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties **are free to litigate points which were not at issue** in the first proceeding . . ." (Emphasis ours.)

The point at issue in the Tax Court was a basis for depreciation and the identical point is at issue in the present case; and, therefore, this case is in entire harmony with the Sunnen case, and the decision of this Court therein, and as this Court said in the Sunnen case, the estoppel operates to relieve the government and the taxpayer of redundant litigation of the identical question of the statute's application to the taxpayer's status. And the decision below further is in harmony with the Sunnen decision, quoting from 333 U. S. 598:

"The judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but only as to those matters **in issue** or points controverted upon the determination of which the finding or verdict was rendered. *Cromwell v. County of Sac*, supra, 94 U. S. 351, 353." (Emphasis ours.)

Petitioner states in its reasons for granting the writ of certiorari that the above quoted principle has been followed by the Tax Court in its decisions, and citing **Volunteer State Life Insurance Co. v. Commissioner**, 35 B. T. A.

491, **Riter v. Commissioner**, 3 T. C. 301, in support. Respondent disagrees with that statement of petitioner and an analysis of the quoted cases will not bear out petitioner's statement or reason.

In **Volunteer State Life Insurance Co. v. Commissioner**, 35 B. T. A. 491, the Board of Tax Appeals decided that petitioner had overpaid his income taxes for 1928 in the amount of \$2,719.94 on the basis of certain issues presented to them. Thereafter on appeal in the Court of Appeals pursuant to a stipulation, the judgment of the Board of Tax Appeals was reversed, and thereafter pursuant to compromise stipulation of the parties to that effect, the Board entered its decision that petitioner had overpaid its income tax for 1928 in the amount of \$1,535.08. The judgment in that case was a compromise judgment and the Tax Court properly said at page 496:

"Therefore the questions in docket 54176 are different from those involved in the present proceeding and res adjudicata has no application."

In **Riter v. Commissioner**, 3 T. C. 301, during the year 1936 four gifts were made and a tax of \$654.07 was paid on the ground that two of the exclusions claimed were gifts of future interest. The Commissioner assessed deficiencies and an appeal was made to the Tax Court. By compromise stipulation filed in that Court, it was agreed that the Tax Court might enter a judgment for overpayment in the amount of \$190.76 and the Tax Court entered a judgment accordingly. In the year 1937 additional gifts were made and again the Commissioner assessed deficiencies. The plea of res adjudicata was set up by the taxpayer. The Court properly held it to be an entirely different cause of action (page 305), and the judgment was not res adjudicata. The Tax Court properly held this, because it was a compromise judgment. All of the Tax

Court cases cited in support of petitioner's statement above are gift tax cases and in none of the Tax Court decisions cited by petitioner did the judgment in the subsequent case disallow any gift exclusion that had been obtained in prior years or did the Tax Court reduce the exemptions that had previously been allowed in the earlier cases. These very facts show that the Tax Court recognized the distinction between compromise judgments and judgments by confession where there is only one single issue in the case and thereby followed the ruling in the Sonnen case, *supra*.

With the distinction in mind between compromise settlements and judgments entered thereon and judgments by confession where there is only one single issue in a cause, we quote the following decisions decided by this Court on the effect of consent judgments.

In **Thompson v. Maxwell**, 95 U. S. 391, 398, this Court said:

"A decree for carrying out a settlement and compromise of a suit is certainly not of itself erroneous. When made by consent it is presumed to be made in view of the existing facts and that these were in the knowledge of the parties. In the absence of fraud in obtaining it, such a decree cannot be impeached."

In **Harding v. Harding**, 198 U. S. 317, 335, this Court said:

"Decrees so entered by consent, cannot be reversed, set aside or impeached * * * except for fraud, unless it be shown that the consent was not in fact, given, or something was inserted as by consent that was not consented to."

See also **McGowan v. Parish**, 237 U. S. 285, 295, and **Russell v. Place**, 94 U. S. 606, 608.

In **United States v. Munsingwear**, 340 U. S. 36, the United States filed a complaint in two counts for price violation: (1) for an injunction and (2) for treble damages. By agreement of the parties the second count was held in abeyance pending trial and final determination of the first count. The District Court dismissed the first count holding that the defendant's prices complied with price regulations. The United States took an appeal and, while the appeal was pending, the commodity involved was decontrolled and the Court of Appeals dismissed the appeal because the question was moot. The United States acquiesced in this dismissal and did not seek to vacate the judgment below. The District Court thereafter dismissed the action on the ground that the matter was res adjudicata. Upon certiorari, this Court sustained the District Court's dismissal citing in support **Southern Pacific v. United States**, 168 U. S. 1, 48-49; **Cromwell v. County of Sac**, 94 U. S. 351, 352; **Commissioner v. Sunnen**, 333 U. S. 591, 597, 598. This Court thereupon recognized the effect of a consent judgment by the United States and upheld the plea of res adjudicata.

In the Munsingwear case, the Court said:

"If there was hardship it was preventable * * * in this case the United States made no motion to vacate the judgment. It acquiesced in the dismissal."

Petitioner in this case complains of the hardship that might be suffered by the Bureau of Internal Revenue. If there is a hardship it was caused by the Commissioner not availing himself of the remedies to which he was entitled in order to preserve his rights. He had an opportunity to put in the stipulation filed with the Tax Court that the determination of the Tax Court should not be held to be a decision fixing the basis for depreciation but he failed to do that and now seeks the aid of this Court to help him in what he calls a case of hardship for the Bureau of

Internal Revenue. If the Bureau of Internal Revenue uses "laconic forms of stipulations" (page 11, petitioner's petition), then it is the fault of those who are in charge of the litigation for the bureau and certainly forms no basis to seek the aid of this Court nor does a mistaken notion of the law obviate the effect of the first judgment. *Guettel v. United States*, 95 Fed. 2d 229, cert. denied 305 U. S. 603.

The petitioner seeks to avoid the rules of law laid down over a long period of years by this Court, beginning with *Cromwell v. County of Sac*, supra, through *Taft v. Western Maryland Railway Co.*, 289 U. S. 620, and the *Sunnen* case, supra, as well as the *Munsingwear* case, supra. This Court has already passed upon and definitely defined what is and what is not res adjudicata, and what narrow limits must be observed as to collateral estoppel. And these narrow limits were followed in the opinion of the Court of Appeals.

Petitioner on page 12 of its petition refers to Section 1117 (d), Internal Revenue Code, 26 U. S. C. 1117 (d), which merely states that where a petition for redetermination of a deficiency has been filed by a taxpayer that the decision of Tax Court dismissing the proceeding is considered as a decision that the deficiency is the amount determined by the Commissioner. Petitioner argues that in light of this provision, a consent judgment of the sort entered in the instant case does not amount to an adjudication of any issue. But this was not a dismissal and there is no proof that it was. Petitioner seeks, in effect, for this Court to say when is a judgment not a judgment.

CONCLUSION.

We respectfully submit in view of the decisions of this Court that we have cited above that there is no conflict between decisions of Courts of Appeal that the question

presented is not a new question but has been passed upon many times as noted above, and therefore the petition for issuance of writ of certiorari should be denied.

Respectfully submitted,

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INTERNATIONAL BUILDING COMPANY,
a Corporation.

On Writ of Certiorari to the United States Court
of Appeals for the Eighth Circuit.

BRIEF
For International Building Company.

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BRIEF

For International Building Company.

OPINIONS BELOW.

The opinion of the District Court (R. 178-185) is reported in 97 F. Supp. 595. The opinion of the Court of Appeals, 8th Circuit (R. 206-224), is reported in 199 Fed. 2d 12.

JURISDICTION.

The jurisdiction of this court is admitted under 28 U. S. C., Sec. 1254 (1).

QUESTION PRESENTED.

The Commissioner of Internal Revenue assessed deficiencies against taxpayer for the taxable years 1933, 1938 and 1939 determining that the basis of depreciation of its building was \$385,000.00 [R. 44, 45, Stip. of Facts (a) and (b)]. Taxpayer filed petitions for review by the then Board of Tax Appeals, alleging in its petitions that the basis for depreciation was \$860,000.00 [R. 45, Stip. of Fact (c)]. That was the only issue presented to the Board for its review and decision. Before the matter could be tried by the Board, the Commissioner and taxpayer filed stipulations with the Board that there was no tax liability for the years in question and that the assessments should be abated (R. 51, 53, Stip. Exhibit C, Exhibit D). Pursuant to the stipulations the Board entered its decision and judgment that there were no deficiencies for those years in question (R. 52, 54, Stip. of Fact. Exhibit C-1, Exhibit D-1). The question presented is whether these decisions and judgments entered by confession and consent are res adjudicata on the basis of depreciation and whether the United States is precluded by collateral estoppel from setting up in later taxable years that the basis of depreciation was \$430,000.00 (R. 43, Stip. of Fact).

STATEMENT.

Due to certain pertinent omissions in the statement of the case set out in the brief for the United States, taxpayer will supply these omissions, as briefly as possible. This was an action at law for the recovery of certain income taxes, declared value excess profit taxes, and excess

profit taxes paid by the taxpayer for the years 1943, 1944, and 1945 (R. 1 and 31). On December 27, 1905, the Liggett Realty Company leased to November Investment Company a plot of ground for 99 years, beginning January 1, 1906, and expiring December 31, 2004 (R. 34). A 17-story fire-proof office building was built thereon by the November Company during 1906 and 1907 at a cost of \$575,000.00 (R. 37; Stip. of Fact). Subsequently, the November Investment Company sold the leasehold and building to West End Realty Company for \$775,000.00 (R. 35 and 107, Stip. of Fact).

On April 14, 1913, the International Building Company was organized with a capital stock of \$300,000.00, consisting of 6,000 shares of common stock, par value \$50.00 per share, and purchased the leasehold and building from the then owner, Nina Realty Co., giving as consideration therefor all of its 6000 shares of common stock and \$300,000.00 face value 6% first mortgage bonds secured by first mortgage on the building. The evidence showed that between 1907 and 1913, \$165,000.00 had been expended in finishing the top eleven floors which were not finished when the building was originally completed (R. 119, Exhibit Z).

Beginning in 1920 taxpayer claimed a basis for depreciation of its building of \$860,000.00 and made its depreciation deduction upon this basis for all years from 1920 through 1939. After 1939 taxpayer claimed an additional sum for depreciation of \$10,383.00 for capital expenditures, as to which there is no dispute (R. 40), making a total basis for depreciation of \$870,383. In making his assessment for additional taxes for the years 1943, 1944 and 1945, the Commissioner, in arriving at the depreciation basis set up by him of \$430,000.00, estimated the reconstruction value May 1, 1913, then took its economic value over the life of the building, added the two values together and averaged that value for depreciation purposes at \$430,000.00 and assessed deficiency taxes for those

years as noted above (R. 43, Stip. of Fact). These taxes were paid, claim for refund was filed, and refused, and this suit for recovery of taxes was instituted. Taxpayer alleged in this suit for recovery of taxes paid, the same allegations as to the basis of depreciation, \$860,000.00 as was alleged in the petitions to the Board of Tax Appeals [R. 45, Stip. of Fact (c)]. It was stipulated that the issue involving valuation for depreciation purposes to be determined in the instant case was the same issue set forth in petitions to the Board of Tax Appeals except for different tax years (R. 45). The taxpayer further pleaded in its petition in the instant case that the basis of depreciation was res adjudicata by judgments of the Tax Court noted above, and that the United States was thereby estopped from assessing deficiency taxes based upon a depreciation basis of \$430,000.00 (R. 7, 15, 17, 20). The District Court denied recovery holding that the decisions of the Tax Court were nothing more than an order confirming an agreement of counsel (R. 180). On appeal to the Court of Appeals, 8th Circuit, that court held that the judgments of the Tax Court were res adjudicata, reversed the cause and remanded it for further proceedings consistent with its opinion (R. 206-224). The Court of Appeals in its opinion carefully analyzed all of the cases cited by the United States in support of its position, which are the same cases cited by the United States to this Court, and a reading of that opinion will disclose the close and particular analysis of each and every case cited by the United States wherein the court distinguishes consent judgments on compromise settlements from the confession stipulations in the instant case.

SUMMARY OF ARGUMENT.

Where a consent judgment is entered by confession in the form of a stipulation on the sole issue in the case it is a bar by way of collateral estoppel in a subsequent action between the same parties upon the identical issue involved in the first proceeding. The entry of such a judgment is a judicial act upon the merits of the cause and is as effective as a judgment rendered after contest and as binding upon the parties, and it must be presumed that all matters of controversy between the parties were covered and disposed of by the stipulation and judgment. The United States cannot go behind the stipulation and pleadings with regard to an issue disclosed by the pleadings. If they had wished to relitigate this issue it should have been included as a part of the stipulation.

The stipulations entered into were not compromise stipulations but were confession stipulations of the only issue in the cause and when consent judgments are entered thereon each case must be studied to see whether the stipulation entered into is a compromise stipulation or a confession stipulation and the doctrine of res adjudicata applied accordingly. When the stipulation confessing judgment is entered into it thereby confesses every issue in the case and as there was only one issue in this case judgment was thereby confessed.

Consent judgments in previous cases between the same parties can not be collaterally attacked in a law action. They can only be attacked by a direct proceeding in equity.

Consent judgments entered into by stipulation are not contracts under the decisions of this court, and while the case at issue is for different tax years it involves the identical same issue as was previously adjudicated before the Tax Court between the same parties and is thereby res

adjudicata regardless of the fact that the claims involve different tax years.

With reference to the doctrine of res adjudicata, the public policy upon which the rule is founded applies with equal force to the sovereign and the claims of private citizens. An alteration of the law in this respect is a matter for Congress and not for the courts. Any contrary decision would overturn and hold for naught the numerous decisions of this court and lower courts on this most important question, and it would throw the doors open to countless thousands of cases of redundant litigation which the parties had heretofore deemed forever settled and judicially determined.

Various cases upon this point were carefully analyzed in detail by the Court of Appeals and therefore its judgment should be affirmed.

ARGUMENT.

I.

The Decisions and Judgment of the Tax Court Are Res Adjudicata on the Basis of Depreciation by Virtue of the Consent Judgments Entered by That Court and Thereby the Government Is Collaterally Estopped From Setting Up a Lower Basis of Depreciation.

The sole and single issue in the cases before the tax court was the basis of depreciation. The same identical issue between the same parties is the issue in the instant case. The United States has admitted this fact in the stipulation of facts filed in the District Court below (R. 45). Upon the basis of stipulations filed in the tax court that the assessments were to be abated, the tax court entered its decision and judgment that there were no deficiencies in income tax for the years in question (Record 51, 52, 53, 54, Exhibits C, C-1, D, D-1). Thereby there was a judgment on the merits by the tax court by confession and by consent by admitting that there were no income taxes due for the years in question. It necessarily follows as a legal conclusive fact that the basis as alleged in taxpayer's appeals to the tax court were correct, and when such an issue has been decided that issue cannot again be relitigated subsequently in another court by the same parties. In **Tait v. Western Maryland Railway Co.**, 289 U. S. 620, 623, 624, 626, the court in dealing with this identical issue said:

“The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action.

... The scheme of the revenue act is an imposition

of tax for annual periods, and the exaction for one year is distinct from that for any other. But it does not follow that Congress in adopting this system meant to deprive the Government and the taxpayer of relief from redundant litigation of the identical question of the statute's application to the taxpayer's status."

Following this pronouncement, the court then continued on page 626 and stated:

"The very right now contested arising out of the same facts appearing in this record was adjudged in the prior proceeding."

Subsequently, in **Commissioner v. Sunnen**, 333 U. S. 591, the court in discussing res adjudicata and collateral estoppel stated on page 598:

"Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding . . ."

As the sole and single issue in the first proceeding is the same identical issue in the instant case, the United States is collaterally estopped from again litigating that issue. In the Sunnen case, the court analyzed in detail estoppel by judgment or collateral estoppel and went on to state that it operated in such cases to relieve the government and taxpayer of redundant litigation of the identical question, citing **Tait v. Western Maryland**, supra, and then went on to hold that the contracts being litigated in the Sunnen case were not the same contracts as had been decided upon in the previous case, and therefore res adjudicata did not apply. This ruling in the Sunnen case follows previous rulings in **Cromwell v. County of Sac**, 94 U. S. 351; **Southern Pacific Railway v. United States**, 168 U. S. 1, 48-54; **City of New Orleans v.**

Citizens' Bank of Louisiana, 167 U. S. 371, 395-400. In the City of New Orleans case, *supra*, the court said:

"The estoppel extends to every material allegation or statement which having been made on one side and denied on the other was the issue in the cause and was determined therein."

There is no principle of law in our jurisprudence that is more inflexible than the above rule of law and just as applicable to tax cases as any other case.

II.

The Consent Judgments Entered Upon Stipulation of the Parties in the Tax Court on the Only Issue in the Causes Is a Judicial Act on the Merits and Operates as Res Adjudicata or as Collateral Estoppel to the Same Effect as a Judgment or Decree Rendered After Contest and Is Binding and Conclusive Upon the Parties.

The United States argues that because no evidence was received, no stipulation of facts entered, no briefs filed and no hearings held, that by reason of those facts, there was no judgment upon the merits. We cannot agree to this theory. On the contrary, common sense, reason and logic show the fallacy of such conclusion where the only issue in the case was the basis of depreciation and if there were no taxes due that constitutes an admission that the allegation for the basis of depreciation was correct because that was the reason that there was an appeal to the tax court.

In **American Woolen Co. v. United States**, 18 F. Supp. 783, 788, 799, motion for new trial overruled 21 F. Supp. 125 (Court of Claims), certiorari denied 304 U. S. 581, on appeal to the tax court by taxpayer, there was no hearing, there was no evidence, there was no stipulation of facts, but there was a stipulation filed in the tax court that there was a deficiency for the year 1922 of a certain sum and

that for 1923 there was an over-payment of a certain sum, and judgment was entered accordingly by the tax court. Subsequently, the taxpayer made certain claims for refund which were rejected and filed suit to recover in the Court of Claims. That court in upholding the plea of res adjudicata by the United States stated:

"That the decision of the Board of Tax Appeals became res adjudicata not only as to such matters as were submitted to the Board but as to all other matters with reference to the taxes for those two years that might have been presented—that the form of the stipulation was such that it must be presumed that all matters of controversy between the parties were covered and disposed of by the judgment."

In the instant case; therefore, it must be presumed by reason and logic on the sole issue in the case that all matters were disposed of by the tax court's judgment.

To the same effect is **Harding v. Harding**, 198 U. S. 317, 334 et seq.

In **Swift & Co. v. United States**, 276 U. S. 311, there was no stipulation of facts filed, no evidence presented and a consent decree was entered by stipulation and the court on the same reasoning upheld the consent decree. See also **Nashville, Chattanooga & St. Louis Railway Company v. United States**, 113 U. S. 261, 266, 267, and **United States v. Parker**, 120 U. S. 89, 95, 96.

In **Urbino v. Puerto Rico Railway, Light and Power Co.**, 164 Fed. 2, 12 (1 C. A.), it was held that a consent decree entered pursuant to a stipulation wherein plaintiffs were awarded unpaid minimum wages but no liquidated damages, constituted an effective bar to a subsequent action by the same parties for liquidated damages only. A similar ruling appears in **Backus v. United States**, 59 Fed. 2 242 (Ct. Cl.). It is evident therefore that the effect of a consent decree by confession is much more far reaching and em-

bracing than the narrow limits which the United States claims, and this is especially true where there is only one issue in the case that was previously decided.

Consent decrees have been enforced in practically all of the circuits of the Court of Appeals throughout the United States. In **Continental Petroleum Co. v. United States**, 87 Fed. 2 91, 94 (10th), Certiorari denied 300 U. S. 679, res adjudicata was upheld on a consent decree, citing *Tait v. Western Maryland*. To the same effect is **Woods Bros. Construction Co. v. Yankton County**, 54 Fed. 2 304, 306 (8th); **United States v. Radio Corporation of America**, 46 F. Supp. 654, 655, 656, appeal dismissed 318 U. S. 796. In the last mentioned case, the court held it to be a judicial act and said:

"Since these consent decrees are based upon an agreement made by the Attorney General which is binding upon the government the defendants are entitled to set them up as a bar to any attempt by the government to litigate the issue raised in the suit . . ."

To the same effect is **Rector v. Suncrest Lumber Co.**, 52 Fed 2 946, 948 (4th C. A.); **O'Cedar Corporation v. F. W. Woolworth**, 66 Fed. 2 363, 366 (7th). In **Snell v. Turner Lumber Co.**, 285 Fed. 356, 358 (C. A. 2), in previous litigation a consent decree was entered and subsequently a new suit was brought for future profits which it was contended was not dealt with by the consent decree. The court held that the action was founded upon the same contract, upon the same breach of action and that the decree in the former case being by consent did not take away from the effectiveness as being binding and conclusive just as it would be after trial on the merits.

In **Ansara v. Regan**, 276 Mass. 586, where a consent judgment had been entered and a subsequent suit was filed, the court upheld res adjudicata saying:

"If, by their agreement, after litigation has been entered upon they put the result in the form of a judgment they henceforth are as much bound by the legal effect of the judgment as if it were the outcome which a court would have reached had the issues disclosed by the pleadings been fully tried and decided They cannot go behind it with regard to an issue disclosed by the pleadings. They must see to it when they agree upon the judgment that issues disclosed by the pleadings intended to be left undecided are excluded from its binding effect."

This most pertinent pronouncement fits the instant case. The United States is attempting to go behind its stipulation and judgment in again trying to litigate the only issue disclosed by the pleadings which, of course, under the above decisions cannot be done. The latter case was cited and applied in **Macheras v. Syrmapolous**, 319 Mass. 480, 486. Similar rulings will be found in **Pick Mfg. Co. v. General Motors**, 80 Fed. 2 639 (C. A. 7th); **Bullard v. Commissioner**, 90 Fed. 2 144, 147 (7th), reversed on other grounds, 303 U. S. 297. See also **Freeman on Judgments**, 5th Edition, 1925, Volume 2, pages 1395, 1396; **50 Corpus Juris Secundum, Judgments**, paragraphs 629, 630; **3 American Jurisprudence, Judgments**, paragraph 458; **Restatement of the Law of Judgments**, sec. 68, pp. 299, 304.

Therefore, it is perfectly obvious that the conclusive effect of a judgment by consent cannot be disputed on the ground that the parties intended to leave undecided an issue disclosed by the pleading unless the judgment provides in express terms that such issue be excluded.

We respectfully submit that for this court to rule otherwise would be in effect an overruling of all of the numerous cases decided to the contrary, some of which we have cited above, and we respectfully submit that neither reason nor logic nor the purpose of the res adjudicata rule

are in harmony or consistent with the United States contention.

III.

The Stipulations Entered in the Tax Court Were Not Compromise Stipulations and the Judgments Entered Thereby Were Consent Judgments by Confession, on the Merits of the Causes.

The stipulations entered into and filed in the Tax Court were not compromise settlements. There was no agreement made that a lesser tax should be paid than that assessed by the Commissioner. It provided for no compromise on the sole issue before the Tax Court. The taxpayer in the instant case had appealed from the taxes assessed by the Commissioner on the depreciation basis set up by the Commissioner and as the basis of his appeal to the Tax Court alleged the basis of depreciation to be Eight Hundred Sixty Thousand Dollars (\$860,000.00). As a consequence there was only one thing for the Tax Court to decide, what was the basis of depreciation. Once that point was decided, then the deduction for depreciation was a matter of calculation. Therefore, when the United States admitted that there were no taxes due for the years in question, it admitted that the allegations in the petition to the Tax Court of the basis of depreciation were correct so that these stipulations mentioned are in no sense to be construed or could they be possibly construed as a compromise settlement.

A distinction should be drawn between compromise stipulations and judgments entered thereon by consent and consent judgments such as were entered in the instant case. In the compromise settlement cases, nothing is decided or determined because the compromise is based upon neither a fact alleged in a taxpayer's petition, or the Commissioner's answer. A compromise is a settlement by mutual concessions. In the instant case there were no

mutual concessions. There was a cold bald admission and confession which settled the entire controversy on the sole issue in the case. This court recognizes this fact in **D. A. Schulte, Inc., v. Gangi**, 328 U. S. 108, 114, which involved a suit for liquidated damages under the Fair Labor Standards Act, wherein the court stated in a footnote:

“ . . . We think the requirement of pleading the issues and submitting the judgment to judicial scrutiny may differentiate stipulated judgments from compromises between parties.”

It would seem that this court has recognized the distinction between compromise stipulations in which consent judgment results and a consent judgment entered by confession as in the instant case where there was no compromise. It is interesting to note that this court in **Fidelity National Bank v. Swope**, 274 U. S. 123, 132, in discussing judgments on a question of res adjudicata said:

“While ordinarily a case of judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function . . . Whenever the law provides a remedy enforceable in the courts according to the legal course of legal procedure and that remedy is pursued, there arises a case within the meaning of the constitution whether the subject of litigation be property or status. **Tutan v. United States**, 270 U. S. 568.”

Therefore the judgments of the tax court in the instant case was the pursuit of a remedy and a case of litigation within the meaning of the constitution. The United States asserts in its brief that the Commissioner of Internal Revenue has consistently assumed that decisions entered on stipulations affect only the particular taxable years involved. Such an assumption is entirely unwarranted when the decisions which we have quoted above have been given

their effect. There may be some basis for such an assumption where a compromise settlement or stipulation is entered into and a consent judgment entered thereon, but that is not the instant case. We have pointed out the distinction between compromise stipulations and consent judgments entered thereon and the type of stipulation entered into in the instant case above. The United States in its brief has cited certain court decisions and Tax Court decisions where consent judgments were held not to be res adjudicata. But when the cases cited are analyzed they will be found not to be comparable in fact to the instant case. Notwithstanding certain unqualified statements made in **Fruehauf Trailer Co. v. Gilmore**, 167 Fed. 2 324 (10th); **Lawrence Manufacturing Co. v. Janesville Cotton Mills**, 138 U. S. 552; **Cutter v. Arlington Casket Co.**, 255 Mass. 52; **Harding v. Harding**, 197 U. S. 317; **Wadham v. Gay**, 73 Ill. 417;¹ **Gay v. Parport**, 106 U. S. 679,² all cited by the United States in its brief; these cases do not support the rule that the mere fact that a judgment was entered by consent prevents its operation as res adjudicata. In the **Fruehauf Trailer** case, the **Lawrence** case and the **Cutter** case, the decision does not require such a ruling. As was quoted³ in **Harding v. Harding**, 198 U. S. 317, which distinguished **Wadham v. Gay** and **Gay v. Parport**, some of these cases involved no problem of res adjudicata at all, but dealt with the power of a court to review a judgment on direct or collateral attack, or with the power of a court of equity to invalidate a decree on the ground of fraud or collusion, as was the case in **Cutter v. Arlington Casket Co.**, supra, or to enforce an incomplete decree because to do so would be inequitable as in **Lawrence Mfg. Co. v. Janesville Cotton Mills**, 138

¹ **Wadham v. Gay**, 73 Ill. 415, was later distinguished in **First National Bank v. Whitlock** (1945), 327 Ill. App. 127, 63 N. E. 2d 659, on the ground that it did not involve a question of res adjudicata.

² In **Gay v. Parport**, 106 U. S. 679, the court appropriated the language used in **Wadham v. Gay**, 73 Ill. 415, involving equitable relief on an incomplete equity decree.

U. S. 552, or that it does not conclude an issue not raised or determined in the former proceeding as in *Fruehauf Trailer v. Gilmore*, *supra*, where there was a compromise consent judgment. This last mentioned case does not support the proposition that a consent judgment never can be *res adjudicata*, because its holding is supported by the doctrine that the question of negligence was never litigated in the former suit or by the rule that the seller was not a party or privy to the former suit and hence is not bound by the judgment. In *Stanback v. Robertson*, 183 Fed. 2 889 (4th Circuit), cited by the United States, the court held that the precise issue in the case before it had not been previously adjudicated and further held that the applicable law had been changed by a supervening decision of the Supreme Court. In *Trapp v. United States*, 177 Fed 2 1, cited by the United States, there was a compromise agreement of the parties and the court in that instant saw the distinction between compromise settlements and stipulations and such as appear in the instant case. In *Hartford Empire Co. v. Commissioner*, 137 Fed 2 540, cited by the United States, a stipulation was filed agreeing to a deficiency and the court said at the top of page 542 that the cost was not an issue in the earlier proceeding, as the previous judgment had been entered on a compromise stipulation. In *Blaffer v. Commissioner*, 134 Fed. 2 389 (5th Circuit), cited by United States, a gift tax case, there was a stipulation entered and filed that the taxpayer was entitled to five exclusions on five gifts under the revenue act. Subsequently, the taxpayer made other gifts and contended that the tax assessed by the second set of gifts should be controlled by the decision in the first case. The court held that they were different gifts, different in number and that the previous decision of the board was not *res adjudicata* as to the issue in the present case, which was a wholly different cause of action involving new gifts made in subsequent years. In *Argo v. Commissioner*, 150

Fed. 2 67 (5th Circuit), certiorari denied 326 U. S. 762, cited by the United States, the court held that the controlling facts of identity in the instant case were not the same as in the former case and therefore ~~res~~ adjudicata did not apply. In **Travelers Insurance Co. v. Commissioner**, 161 Fed. 2 93 (2nd Circuit), certiorari denied 332 U. S. 766, cited by United States, the court ruled that transferee liability was not an issue in the previous case, and therefore was not res adjudicata. In **Commissioner v. Texas Empire Pipe Line Co.**, 176 Fed. 2. 523 (10th Circuit), cited by the United States, the court held that the same question of basis for depreciation presented in the former proceeding before the Tax Court on computation of deficiency under Rule 50 of the Tax Court the Commissioner was bound by collateral estoppel upon authority of the *Sunnen Case*, 333 U. S. 591, the conditions being the same. In **Burford Toothaker Tractor Co. v. Commissioner**, 192 Fed. 2 663, cited by the United States, Tax Court held compensations payable in 1935, '36 and '37, were reasonable, and further held such decisions were not a bar to unreasonable compensations for the years 1941, '42 and '43, as economic conditions had changed requiring different facts and different evidence, citing the *Sunnen Case*, *supra*, in support. In **Cory v. Commissioner**, 159 Fed. 2 391 (3rd Circuit), cited by the United States, the court held that the Tax Court in four trusts established for various members of his family the income was taxable against the creator of the trust under the doctrine of *Helvering v. Clifford*, 309 U. S. 331—that was res adjudicata for subsequent years as the same trusts, the same parties and the same issues were before the court and that while each year's claim for taxes was a separate claim that this did not prevent the application of res adjudicata. The court further held in this case that the doctrine of res adjudicata was not rendered inapplicable in the subsequent case merely because the claimant in the prior case did not

present his evidence because the burden of proof was on the Commissioner in the Tax Court, as the parties are not entitled to have a question considered on its merits a second time because they failed to produce all the facts the first time the case is up for decision.

In **Gillespie v. Commissioner**, 151 Fed. 2 903, cited by the United States, the court upheld the plea of res adjudicata by the Commissioner as the same issue was decided in the previous case between the same parties, which was in the prior case that the amount paid to the taxpayer was an annuity and taxable as such, and was not a return of capital, and that that was the identical issue in the case before the court.

In **Pelham Hall Co. v. Hassett**, 147 Fed. 2 63 (1st Circuit), cited by the United States, the court held that the issue of a tax-free reorganization was not an issue in the previous case nor was it decided in the previous case, and therefore res adjudicata did not apply.

Nor were any of the questions in any of the above cases cited by the United States a question of law, as contended for by the United States. In each of the cases it was a factual issue which the court looked at as to whether or not that factual issue had been determined or not in the previous case. In fact in the very same Tenth Circuit in which the Trapp case, supra, was decided and upon which the United States places such reliance, that very same court two months later in **Martin v. Brodrick**, 177 Fed. 2 886 (10th Circuit), upheld the plea of res adjudicata made by the Commissioner on a previous decision of the Tax Court, citing the Trapp case, supra, in support, which again shows that the Tenth Circuit recognized the distinction between compromise stipulations and consent judgments, such as exist in the Trapp case and the situation presented in the Martin case, supra.

In **Lawrence v. Janesville Cotton Mills Co.**, 138 U. S. 552, cited by United States in the first suit brought by the plaintiff, against a manufacturing company, a consent decree was entered restraining the defendant from using a label with plaintiff's trade-mark thereon. Subsequently the same plaintiff brought a second suit to restrain the defendant Janesville-Cotton Mills, who was a successor to the original defendant, from using this trade-mark and enforce the former decree. However, in another case, **Lawrence Mfg. Co. v. Tenn. Mfg. Co.**, 138 U. S. 537, it had been held in the meantime that the plaintiff was not entitled to the exclusive right to use this trade-mark; therefore the consent decree was held to be erroneous, the court holding that since it had been decided that since the consent decree was entered that the plaintiff was not entitled to the exclusive use of the trade-mark, that the issue was not res adjudicata. This was proper as there had been a change in the intervening law under the doctrine of *Sunnen* case, supra.

Volunteer State Life Insurance Co. v. Commissioner, 35 B. T. A. 491, reversed on other grounds 110 F. 2d 879. Certiorari denied 310 U. S. 636, cited by the United States. The Board of Tax Appeals decided that petitioner had overpaid his income taxes for 1928 in a certain amount on the basis of certain issues presented to them. Thereafter on appeal in the Circuit Court of Appeals pursuant to a stipulation the judgment of the Board was reversed and thereafter, pursuant to a compromise stipulation of the parties that petitioner had overpaid its income tax in a lesser amount than that which the Board had previously awarded, the Board entered its decision pursuant to the stipulation for the lesser amount. Therefore the stipulation in that case was a compromise stipulation and a consent judgment was entered upon that basis.

Riter v. Commissioner, 3 T. C. 301, cited by the United States. The Commissioner had assessed deficiencies on

certain gifts. An appeal was made to the Tax Court and a compromise stipulation filed in that court. It was agreed that the Tax Court might enter a judgment for overpayment in a much lesser amount and the Tax Court entered its consent judgment accordingly. In subsequent litigation of additional gifts made in later years the plea of res adjudicata was set up and the tax court held that it was not res adjudicata.

The distinction between all of the above cases cited by the United States in its brief is obvious. Practically all of the cases cited were consent judgments, which were not held to be res adjudicata, were compromise settlement cases where nothing was decided by the judgment of the court, and despite the brief of the United States to the contrary the facts in the instant case show that the stipulation entered into herein was not a compromise settlement and therefore none of the above cases are in point.

IV.

The Consent Judgments Entered by the Tax Court Are Not Contracts, Nor Is the Principle of Res Adjudicata Affected by the Fact That Different Tax Years Are Involved, as Alteration of the Law in This Respect Is for the Law-Making Body and Not the Courts.

One of the cases strongly relied upon by the United States in its brief is **Volunteer State Life Insurance Co. v. Commissioner**, supra. In that case the Board held in denying res adjudicata that a consent decree was not a judgment of the court but was a contract between the parties entered into of record with the court's consent. That pronouncement is directly contrary to all fundamental principles of contracts, as in a compromise settlement and a consent decree entered thereon, all the fundamental elements of a contract are non-existent.

In fact this court in **United States v. Swift & Co.**, 286 U. S. 106, 115, at page 462, expressly held that a consent judgment was not a contract in this language saying:

"We reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act."

The court further held at page 119:

"The injunction whether right or wrong is not subject to impeachment in its application to the conditions that existed at its making."

Therefore, it will be plainly seen that the statement of the Board in Volunteer Life case, supra, is directly opposite to the ruling of this court and therefore should be given no consideration.

The United States again urges the court to consider the fact that the instant case involves different tax years and that the ultimate fact was not admitted in the stipulations filed in the Tax Court. It is true that the instant case involves different tax years, but it is not true that the ultimate fact was not decided by the consent judgments of the Tax Court. Where there is only one fact in issue before the Tax Court and the United States has admitted by stipulation that there are no taxes due under that issue then by the consent judgment entered by virtue of the confession there has been a judgment upon the merits as will be noted from the various decisions that we have cited heretofore.

This court in **City of New Orleans v. Citizens' Bank of Louisiana**, 167 U. S. 371, 395, et seq., wherein this same point was urged, as in the instant case stated:

"No principle of law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies. Whether the

reasons upon which it was based were sound or not and even if no reasons at all were given, the judgment imports absolute verity and the parties are forever estopped from disputing its correctness . . . "The estoppel extends to every material allegation of statement which having been made on one side and denied on the other was at issue in the cause and was determined therein . . . "It follows then that the mere fact that the demand in this case is for a tax for one year and the demands in the adjudged cases were taxes for other years does prevent the operation of the thing adjudged, if in the prior cases the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed."

Subsequently this court in **Commissioner v. Sunnen**, 333 U. S. 591, made the identical same pronouncement in somewhat different language. The United States urges upon the Court the fact that the Commissioner had always assumed that what they are now urging upon the Court was law. The rule of res adjudicata is based upon public policy requiring the ending of litigation and it is not dependent upon the parties' knowledge of their legal rights. In **Guettel v. United States**, 95 F. 2, 229, 232, certiorari denied 305 U. S. 603, the court in discussing this doctrine said:

"The public policy upon which the rule is founded has been said to apply with equal force to the sovereign's demand and the claims of private citizens. Alteration of the law in this respect is a matter for the law making body rather than the courts. *Tait v. Western Maryland Railway Co.*, 289 U. S. 620 . . . The same public policy which gives rise to the rule should, we think, prevent its applicability being made dependent upon the knowledge or lack of knowledge of the parties as to their legal rights. Moreover,

while a judgment upon the merits may be set aside for equitable reasons in a direct proceeding brought for that purpose, it may not be impeached collaterally."

As the instant case is a proceeding at law for the recovery of taxes, the United States cannot attack the judgments in the Tax Court collaterally in this proceeding. Nor does the assumption of the Commissioner on what he thought the law was, change the public policy of the law of res adjudicata. There is some basis for the Commissioner's assumption that that is the law where consent judgments are entered upon compromise stipulations but we unhesitatingly assert that it is not the law on confession stipulations and consent judgments entered therein as we have demonstrated by the numerous cases cited above.

As to the matter of public policy which the United States urges upon the Court, that same argument was presented to this court in the **City of New Orleans v. Citizens' National Bank of Louisiana**, supra, the court saying:

"The argument that as a matter of public policy the principle of the thing adjudged should be held not to apply to controversies as to taxation, if there be merit in it, should be addressed to the law making, and not the judicial department."

This court then went on to discuss the fallacy of the argument advanced and stated that if that argument prevailed:

"Every decree of this court enforcing taxation in order to discharge obligations previously contracted, where the right to the tax was a part of the obligation, is deprived the sanctity of the thing adjudged; for manifestly if the estoppel of the thing adjudged does not arise from a judgment preventing taxation, such an estoppel cannot also result from a judgment enforcing taxation."

We can find no better words to answer the argument advanced by the United States in this respect than that which we have quoted above.

The United States cites *Cromwell v. Sac*, 94 U. S. 351, 356, as authority for its position that the ultimate fact was not adjudged in the previous tax court proceeding. In that case consent judgment entered upon a stipulation of confession was not present and therefore that phase of the case is not applicable for consideration. What the court did hold in that case was that the question whether the plaintiff was a bona fide holder of the tax coupons for value before maturity had not been an issue in the previous case nor was it presented. In fact in that case the court plainly stated:

“But where the second action by the same parties is upon a different claim or demand the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.”

As the only issue in the instant case was the ultimate fact of the basis for depreciation under the pronouncement of this court in *Cromwell v. Sac*, supra; *City of New Orleans v. Citizens' Bank of Louisiana*, supra, and *Commissioner v. Sunnen*, supra, this court should do naught else but reaffirm those decisions.

The United States further in its brief constantly uses the word “litigating” and cites the *Sunnen* case, supra, to the effect that the ultimate issue was not actually litigated. Obviously what they are attempting to get this Court to rule is that the ultimate fact must have been actually tried before the court before it can be res adjudicata. There was no necessity for further litigation because by the very fact the appeal to the tax court was on the sole

issue on the basis of depreciation and the resulting computation of the tax thereon, when that tax is admitted and confessed not to be due they confess the basis of the appeal and there is no necessity of further litigation; litigation does not mean the actual trial of a dispute. It is a dispute at law involving pleadings, trial and judgment; when the necessity of trial is dispensed with by confession of the fact in issue, then the court exercises its judicial function and enters judgment accordingly on the merits. Were the law otherwise, then the decisions and phrases as to precluding "redundant litigation of the identical question" in many of the decisions of this court quoted above would be meaningless and would afford relief to neither the United States or taxpayers. The very language in the *Sunnen* case and the other cases above on the effect of consent judgments forecloses such a warped construction of the law. In *Commissioner v. Sunnen*, supra, at page 598, the court plainly states that collateral estoppel operates only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered, and that

"Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been rendered and decided at that time."

When the United States admitted that there were no taxes due by their confession in the stipulation, there was no other issue to be tried, the lawsuit was ended because the basis of depreciation on which taxes are due was the only issue in the case by their own admission in the stipulation of fact filed in the District Court. It would be senseless and against all common sense and reason after such a stipulation by confession was entered into for the Commissioner to go to the Tax Court on that same proceeding

and ask to have the only issue the basis of depreciation heard by the Tax Court because by their confession they had already admitted that fact and such would be contrary to Rule 31 (b) of the Tax Court, 26 U. S. C., Section 1111, wherein that rule in the last three lines thereof states:

“That the court would not receive evidence tending to qualify, change or contradict any fact properly introduced to the record by stipulation.”

The Tax Court would not have permitted the Commissioner to have introduced any evidence controverting the basis of depreciation upon the deduction calculated originally by taxpayer in its return because to do so would controvert the very words of their stipulation. For these reasons it is respectfully submitted that the argument of the United States in this respect is without merit.

CONCLUSION.

In view of the many decisions of this court as well as lower courts as cited above, it is respectfully submitted that this court should distinguish the distinction between compromise stipulations and consent judgments entered thereon and stipulations by confession and consent judgments thereon, and thereby affirm the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX A.

Tax Court Rules, 26 U. S. C., Sec. 1111

Rule 31. (a) * * *

(b) Stipulations. The parties, by stipulating in writing filed with the Court or presented at the hearing, may agree upon any facts involved in a proceeding. Stipulations filed need not be formally offered to be considered in evidence. Written stipulations shall be filed in duplicate. Duplicates of exhibits appended to the stipulation need not be provided unless requested. Both parties shall endeavor to stipulate evidence to the fullest extent to which either complete or qualified agreement can be reached. If all evidence lending itself to stipulation, as, for example, entries or summaries from books of account and other records, has not been stipulated at the time the notice of the date of the hearing is mailed, then the party desiring to introduce such evidence shall confer with his adversary or opposing counsel promptly after receipt of the hearing notice in an effort to stipulate such facts. Any objection to the relevancy of a particular part or all of a stipulation should be noted in the stipulation, but the Court will give consideration to any objection to the relevancy of stipulated facts made at the hearing. The Court may set aside a stipulation where justice requires, but will not receive evidence tending to qualify, change, or contradict any fact properly introduced into the record by stipulation.

(c) * * *

(d) * * *

(e) * * *

(f) * * *

(g) * * *

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No. 508.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

UNITED STATES OF AMERICA,
Petitioner,

v.

INTERNATIONAL BUILDING COMPANY,
a Corporation.

PETITION FOR REHEARING
By International Building Company.

IRL B. ROSENBLUM,
MALCOLM I. FRANK,
418 Olive Street,
St. Louis, Missouri,
Attorneys for International
Building Company.

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UNITED STATES OF AMERICA,
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INTERNATIONAL BUILDING COMPANY,
a Corporation.

PETITION FOR REHEARING

By International Building Company.

Comes now International Building Company and presents its petition for rehearing on the decision rendered in this cause May 4, 1953, and as grounds and reason therefor respectfully states:

I.

The Opinion, Pages Three and Four, Overrules and Is Contrary to Fundamental Doctrines of Our Jurisprudence as to the Effect of a Consent Judgment and Its Necessary Implications as Announced by This Court in

Thomson v. Wooster, 144 U. S. 104, 110;

Nashville, Chattanooga & St. L. Railway Co. v.

United States, 112 U. S. 261, 266, 267;

United States v. Parker, 120 U. S. 89, 95, 96;
Swift & Co. v. United States, 276 U. S. 327, 328;
Pope v. United States, 323 U. S. 1, 12.

The basis of the decisions made in the opinion have all been ruled to the contrary in the above cited cases.

Thomson v. Wooster, 114 U. S. 104, 110, states:

"A confession of facts properly pleaded dispenses with proof of those facts and is as effective for purposes of the suit as if the facts were proved."

In *Nashville, Chattanooga & St. L. Railway Co.*, supra, where a consent judgment was entered, and the identical defense raised in a subsequent suit that the claim was not litigated or submitted in the previous suit as the defense in the instant case, the Court said in response to such a defense:

"But the insurmountable difficulty is that the former decree appears to have been rendered by the consent of the parties * * * neither party can deny its effect as a bar of a subsequent suit in any claim included in the decree."

In *United States v. Parker*, 120 U. S. 89, 95, 96, with reference to consent judgments and their implications, this Court said:

"* * * must be understood in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself, to amount to such an **adjustment of the merits** of the controversy by the parties themselves * * *. This is equivalent to a judgment that the plaintiff had no cause of action because the defense of the defendant was found to be sufficient in law and true in fact. Upon general principles of common law, regulating practice and procedure in Courts of Justice, it must be held that the judgment

here in question is final in its form and nature and must have the effect of a bar to the present action * * * " (Emphasis ours.)

In **Swift & Co. v. United States**, 276 U. S. 311, 327, 328, wherein a consent judgment was rendered, without a hearing, where no briefs were filed, and there was no argument, and a stipulation of judgment was filed by the parties, and wherein subsequently the same defense was entered as in the instant case, this Court held in response to such a defense:

"The argument ignores * * * the legal implications of a consent decree."

The Court further said as to the defense that the judgment was a general one and not specific (as the Court in effect stated in its opinion in the instant case):

"The paragraphs if standing alone to the objection * * * but they do not stand alone, they are to be read in connection with other paragraphs of the decree and with the allegations of the bill. When so read all uncertainties are removed." (Emphasis ours.)

In **Pope v. United States**, supra, this Court said with reference to consent judgments:

"It is a judicial function and an exercise of the judicial power to render judgment on consent. A judgment upon consent is a judicial act * * *. It is likewise a judicial act to give judgment on a legal obligation which the court finds to be established by stipulated facts."

Obviously this Court, although not mentioning any of the above cases in its opinion, did not intend to overrule them and rule contrary thereto and thereby upset one of the fundamental principles of our jurisprudence as to res adjudicata or collateral estoppel on a consent judgment.

Under the ruling in the opinion rendered the Court has set up a precedent that will have a most tremendous impact on innumerable cases that have heretofore been considered adjudicated for all time, including tax cases, anti-trust cases, and especially civil cases involving injunctions. Under the ruling in this opinion, **Swift & Co.** could if necessary take action and ignore the judgment in its case cited above and say that the issues were never presented to the Court for determination (as is held in the opinion in the instant case), and this Court, to be consistent with the instant opinion, would be compelled to assent or overrule the law laid down in the present opinion. The Court has failed to take into consideration the implications of a consent judgment, as held in the foregoing previous opinions.

II.

The Court Has Ruled as to Form and Adjudged the Case Thereon Rather Than Substance.

This Court has in numerous instances, and especially tax cases, held that it looks to substance rather than to form and that technical consideration and legal paraphernalia could not obscure the basic issue. Justice Douglas, who wrote the opinion in the instant case, so held as above noted in **Helvering v. Clifford**, 309 U. S. 331, 334.

III.

Russell v. Place, 94 U. S. 606, 608, Cited in the Opinion, Cannot Apply Because the Judgment in That Case Was Not a Consent Judgment With Its Consequent Implications and the **Russell Case** Further Cannot Apply Under the Previous Rulings of This Court in the **Swift & Co. Case**, *Supra*, and the Other Cases Cited Above.

Russell v. Place, 94 U. S. 606, 608, cited in the opinion, was not a consent judgment case on the merits, and there-

fore that case has evidently been cited inadvertently by the Court. That case held that there must be a showing in the record or by extrinsic evidence "that the precise question was raised or determined in the former suit." Under the stipulations filed in the Tax Court, the consent judgment on the merits was entered by the Tax Court and it is a part of the record which facts the Court has obviously overlooked. Therefore the statement in the Court's opinion in the instant case that "there is no showing either in the record or by extrinsic evidence . . . that the issues raised by the pleadings were submitted, etc.," finds no support in the record. In consent judgments by confession, as in the instant case, there is no need for extrinsic evidence over a single issue in the case that has been confessed. The Court's opinion in this respect is contrary to and overrules the decision in the Swift Case, supra, and the other cases cited above.

IV.

The Opinion of the Court, Page Three, That There Is No Showing That the Issues Were Submitted to the Tax Court Is Contrary to the Record.

The stipulation of facts filed in the District Court below (R. 46 f) shows that the United States admits that the Tax Court entered its decision and the United States under the law cannot deny its own admission that the matter was submitted to the Tax Court for judgment.

The Court Has Obviously Considered Unsworn Evidence as a Part of the Record.

The court has obviously considered unsworn evidence as a part of the record (a letter from the Clerk of Tax Court) attached to the United States reply brief filed with this court, as a part of the record, which of course it is not.

The place to introduce such evidence is the Trial Court, and even if offered there would not be admissible over objection for two reasons, (one) that it is unsworn evidence and not subject to cross-examination, and (two) that it is contrary to the admission in the stipulation of facts of the party seeking to introduce it (R. 26, Stipulation of Fact f).

VI.

The Court Has Written Its Opinion as If There Were More Than One Issue in the Cases Before the Tax Court.

The opinion of the court (page 3, last paragraph) uses the phrase, " * * * that the issues raised by the pleadings were submitted * * * "; such a statement, we respectfully submit, is contrary to the Record. On page 44 of the R. 18 (a) and on page 45 of the Record (c), which are part of the stipulation of facts filed in the District Court, the United States admitted that the basis of depreciation was the only single issue in the case before the Tax Court and that it was the same identical issue in the instant case. We respectfully submit, therefore, that the record does not warrant the use of the word "issues" as plural in the opinion and that thereby the Court has erred.

VII.

The Fact That the Upholding of a Consent Judgment as Collateral Estoppel in This Case Might Embarrass the Commissioner of Internal Revenue in His Administration of the Tax Laws Is No Ground for Not Upholding Collateral Estoppel.

This Court in several cases has announced and particularly in *Tait v. Western Maryland Railway Co.*, 289 U. S. 620, 624, wherein this same embarrassment as to the administration of the law was pleaded as a defense, the court stated:

"We are not persuaded that the operation of the principle of the thing adjudged in tax cases will, as petitioner insists, produce serious inequalities, or result in great confusion; but any adverse consequence in the administration of the law furnishes no sufficient reason for the abandonment of a rule founded in sound policy, to the enforcement of which suitors are in justice entitled."

CONCLUSION.

For the reasons assigned under the rulings of this Court, as noted above, your petitioner respectfully submits that this Court should apply the same rules and considerations as announced in the above cited cases in the same manner as it has heretofore applied them to litigants against the United States, and thereby preserve a rule founded on sound public policy to which taxpayers as well as the United States are in justice entitled to; your petitioner for a rehearing earnestly requests each Justice of this court to reconsider this case and the opinion rendered thereon and prays that the Court set aside its opinion and judgment and grant a rehearing.

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Attorneys for International
Building Company.

Certification.

Counsel for International Building Company hereby certify that the above and foregoing petition for rehearing is presented and filed in good faith on the merits of the cause and not for purposes of delay.

Irl B. Rosenblum,
Malcolm I. Frank.